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SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. 794

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, PETITIONER,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 794

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, PETITIONER,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. 7800, Civil.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, Plaintiff,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, B. E. ROARK, A. J. MYERS, J. W. CROCKER, M. C. BROWN, CARL F. AHRENS, N. E. DOOLITTLE, M. C. FEATHER and R. E. CARROLL, Defendants.

COMPLAINT—Filed November 19, 1962

1. Plaintiff is a corporation organized under the laws of Delaware with its principal place of business in Denver, Colorado. Plaintiff owns and operates a railroad system of about 2100 miles in interstate and intrastate commerce and is a carrier within the meaning of and subject to the Railway Labor Act.

2. Defendant, Brotherhood of Railroad Trainmen, is a labor organization and the duly designated representative under the Railway Labor Act of a class of employees of [fol. 2] plaintiff. Defendant carries on its business as representative in Denver, Colorado. At all times material herein an agreement was in effect between plaintiff and defendant covering rates of pay, rules, and working conditions of plaintiff's employees represented by defendant.

3. On or about February 5, 1953, defendant submitted to the National Railroad Adjustment Board, First Division, pursuant to Section 3 First (i) of the Railway Labor Act, claims for additional pay for certain conductors and brakemen on account of work performed at plaintiff's

North Yard. On January 20, 1960, the Adjustment Board rendered Award 19389 sustaining these claims.

4. On or about March 3, 1953, defendant submitted to the National Railroad Adjustment Board, First Division, pursuant to Section 3 First (i) of the Railway Labor Act, claims for additional pay for certain brakemen on account of an alleged improper change in freight service between Provo and Eureka, Utah. On December 17, 1959, the Adjustment Board rendered Award 19372 sustaining these claims.

5. Plaintiff refused to comply with Awards 19389 and 19372. The sole remedy of defendant, under the Railway Labor Act, for enforcing Awards 19389 and 19372 was an action in the United States District Court, under Section 3 First (p).

6. On April 12, 1960, defendant notified the National Mediation Board that its members would withdraw from service on the lines of plaintiff, beginning at 2:30 P.M., April 15, 1960. The National Mediation Board thereupon proffered its mediation services. Defendant postponed its threatened strike during mediation, which continued until May 13, 1960.

7. On May 16, 1960, at 1:30 P.M., defendant notified plaintiff that its members would withdraw from service, beginning at 2:00 P.M. on May 16. The strike commenced as called and continued until eight hours later, when it ceased pursuant to a restraining order entered by this Court.

8. The strike was called by defendant for the purpose of enforcing awards and orders of the National Railroad Adjustment Board, to wit Awards 19389 and 19372 and the orders thereunder. The defendant failed to exhaust the remedies provided by the Railway Labor Act, in particular Section 3 First (p) thereof, prior to calling and engaging in the strike. Defendant thereby violated its duties under the Railway Labor Act.

[fol. 3] 9. The illegal strike called by defendant forced a suspension of plaintiff's operations as a common carrier and caused traffic to be diverted by shippers from the lines of plaintiff, thereby resulting in a loss of revenue. Plaintiff was damaged by the calling and carrying out of defendant's unlawful strike in the amount of $50,000.

10. The jurisdiction of this Court arises under Sections 1331 and 1337 of Title 28 of the United States Code. The amount in controversy exceeds the sum of $10,000 exclusive of interest and costs.

Count II.

1-6. Plaintiff hereby incorporates by reference paragraphs I though 7 of Count I as paragraphs 1 through 7 of Count II.

8. On May 16, 1960, plaintiff was lawfully operating as a common carrier in Colorado and elsewhere. On or about that date, defendant entered into a conspiracy or combination with its members and officers for the purpose of hindering and preventing plaintiff from carrying on its duties and lawful business as a common carrier in that defendant wilfully and without excuse caused an illegal strike or concerted work stoppage on plaintiff's railroad lines.

9. Plaintiff hereby incorporates by reference paragraph 9 of Count I as paragraph 9 of Count II.

Wherefore, The Denver and Rio Grande Western Railroad Company prays that it have judgment on Count I of its Complaint or, in the alternative, on Count II of its Complaint against the defendant, Brotherhood of Railroad Trainmen, in the sum of $50,000.

Ray Garrett, William M. McGovern, Jr., T. A. White, Kenneth D. Barrows, Attorneys for Plaintiff.

Sidley, Austin, Burgess & Smith, Of Counsel.

[fol. 4]

IN THE UNITED STATES DISTRICT COURT

MOTION OF DEFENDANT BROTHERHOOD OF RAILROAD TRAINMEN TO DISMISS COMPLAINT OR QUASH THE RETURN OF SERVICE OF SUMMONS—Filed December 26, 1962

Now comes the Brotherhood of Railroad Trainmen, defendant in the above-entitled cause, to move the Court pursuant to Rule 12(b) of the Federal Rules of Civil Procedure as follows:

1. To dismiss the action on the grounds that it is in the wrong district because (a) the jurisdiction of the Court is invoked under the laws of the United States, and (b) defendant is an unincorporated organization whose headquarters are located in Cleveland, Ohio, and is an inhabitant thereof;

2. To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds that the defendant has not been properly served with process under Rule 4(d)(3) of the Federal Rules of Civil Procedure.

There is attached to this motion the affidavit of Mr. William E. B. Chase, Acting General Secretary and Treasurer of the Brotherhood of Railroad Trainmen.

There is also attached a memorandum of points and authorities supporting the motion.

Respectfully submitted,

Philip Hornbein, Jr., Wayland K. Sullivan, General Counsel, Brotherhood of Railroad Trainmen, James L. Highsaw, Jr., Attorneys for the Defendant, Brotherhood of Railroad Trainmen.

December 24, 1962

AFFIDAVIT IN SUPPORT OF MOTION

State of Ohio,
Cuyahoga County, ss.:

Now comes William E. B. Chase, who first being duly sworn, deposes and respectfully says as follows:

That he is the duly elected, qualified and acting General Secretary and Treasurer of the Brotherhood of Railroad [fol. 5] Trainmen; that he has his office at 1370 Ontario Street, Cleveland, Ohio; and that the statements hereinafter made are asserted of his own knowledge and belief.

That the headquarters of the Brotherhood of Railroad Trainmen are at 1370 Ontario Street, Cleveland, Ohio; and that said Brotherhood does not maintain any office in Denver, Colorado. The location of the headquarters of the Brotherhood in Cleveland, Ohio, is provided for in Section 3 of the Constitution.

That Mr. R. E. Carroll is the Chairman of the General Grievance Committee on the Denver & Rio Grande Western Railroad Company in Denver, Colorado. Said Chairman Carroll is elected to said office by the Chairmen of the local grievance committees of various local lodges having members employed on the Denver & Rio Grande Western Railroad Company. He is not an officer of the Brotherhood of Railroad Trainmen; is not a general or managing agent of said Brotherhood; and is not an agent of the Brotherhood of Railroad Trainmen for service of process or otherwise.

That the Constitution and General Rules of the Brotherhood of Railroad Trainmen provide for the election of General Chairmen by the Chairmen of the local grievance committees of the local lodges on said railroad. The following provisions of said General Rules apply to said election and read, in pertinent part, as follows:

"Local Grievance Committees.

"No. 1 (a). All subordinate lodges shall elect local grievance committees for each division or system repre-

sented in the lodge by five or more members, said committees to consist of three, namely, chairman, vice chairman and secretary, to be elected from among and by the members in actual train, yard or bus service on the division or system which the committee is to represent. * * *"

General Rule 2 reads, in pertinent part, as follows:

"General Grievance Committee—Elections.

"No. 2 (a). On any line or system of railroad or bus company there shall be a general grievance committee formed in the month of January following the quadrennial election of local grievance committees for that line and must consist of the chairmen of the local grievance committees on that line of road, * * *." Etc.

[fol. 6] The election of the officers of a General Grievance Committee is provided for in General Rule 2 (b) which reads, in pertinent part, as follows:

"(b). The officers of a general grievance committee shall be elected on the final day of the quadrennial formation, * * and shall consist of a chairman, vice chairman, and secretary, * *." Etc.

General Chairman Carroll's salary is paid out of funds which are contributed by the members of the local lodges represented by his Committee and confined to the lodges having members employed locally on the Denver & Rio Grande Western Railroad Company.

Further affiant sayeth not.

William E. B. Chase.

Sworn to before me and subscribed to in my presence this 17th day of December, 1962.

Roy H. Neville, Notary Public—State of Ohio.

My commission has no expiration date. Section 147.03 R.C.

(Seal)

Filed December 26, 1962.

IN THE UNITED STATES DISTRICT COURT

AMENDED COMPLAINT—Filed January 21, 1963

Plaintiff hereby amends its complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure and complains against the defendants as follows:

Count I.

1. Plaintiff is a corporation organized under the laws of the State of Delaware with its principal place of business in Denver, Colorado. Plaintiff owns and operates a railroad system of about 2100 miles in interstate and intrastate commerce and is a carrier within the meaning of and subject to the Railway Labor Act.

2. Defendant, Brotherhood of Railroad Trainmen, is a labor organization and the duly designated representative under the Railway Labor Act of a class of employees of plaintiff. Defendant carries on its business as representative in Denver, Colorado. At all times material herein an agreement was in effect between plaintiff and defendant Brotherhood covering rates of pay, rules, working conditions of plaintiff's employees represented by said defendant.

[fol. 7] The defendant Brotherhood of Railroad Trainmen has an office and carries on business in Denver, Colorado. The defendant Brotherhood consists of a Grand Lodge and several subordinate Local Lodges. Defendants, B. E. Roark, A. J. Myers, J. W. Crocker, Carl F. Ahrens, N. E. Doolittle, M. C. Feather and M. C. Brown are all Local Chairmen of Local Lodges of the defendant Brotherhood. Defendant R. E. Carroll is a General Chairman of the defendant Brotherhood. They all reside within this district and act for the Brotherhood in matters of grievance adjustments on the plaintiff railroad.

4. The members of the defendant Brotherhood employed by plaintiff constitute a class so numerous as to make it impracticable to bring them all before this Court. The in-

dividual defendants named herein fairly and adequately represent said class.

5. On or about February 15, 1953, defendants submitted to the National Railroad Adjustment Board, First Division, pursuant to Section 3 First (i) of the Railway Labor Act, claims for additional pay for certain conductors and brakemen on account of work performed at plaintiff's North Yard. On January 20, 1960, the Adjustment Board rendered Award 19389 sustaining these claims.

6. On or about March 3, 1953, defendants submitted to the National Railroad Adjustment Board, First Division, pursuant to Section 3 First (i) of the Railway Labor Act, claims for additional pay for certain brakemen on account of an alleged improper change in freight service between Provo and Eureka, Utah. On December 17, 1959, the Adjustment Board rendered Award 19372 sustaining these claims.

7. Plaintiff refused to comply with Awards 19389 and 19372. The sole remedy of defendants under the Railway Labor Act for enforcing Awards 19389 and 19372 was an action in the United States District Court, under Section 3 First (p).

8. On April 12, 1960 defendants notified the National Mediation Board that their members would withdraw from service on the lines of plaintiff, beginning at 2:30 P.M., April 15, 1960. The National Mediation Board thereupon proffered its mediation services. Defendants postponed their threatened strike during the mediation, which continued until May 13, 1960.

9. On May 16, 1960, at 1:30 P.M. defendants notified plaintiff that their members would withdraw from service, beginning at 2:00 P.M. on May 16. The strike commenced as called and continued until eight hours later when it ceased pursuant to a restraining order entered by this Court.

[fol. 8] 10. The strike was called by defendants for the purpose of enforcing awards and orders of the National Railroad Adjustment Board, to-wit: Awards 19389 and 19372 and the orders thereunder. Defendants failed to exhaust the remedies provided by the Railway Labor Act, in particular, Section 3 First (p) thereof, prior to calling and engaging in the strike. Defendants thereby violated its duties under the Railway Labor Act.

11. The illegal strike called by defendants forced a suspension of plaintiff's operations as a common carrier and caused traffic to be diverted by shippers from the lines of plaintiff, thereby resulting in a loss of revenue. Plaintiff was damaged by the calling and carrying out of defendants' unlawful strike in the amount of $50,000.

12. The jurisdiction of this Court arises under Sections 1331 and 1337 of Title 28 of the United States Code. The amount in controversy exceeds the sum of $10,000 exclusive of interest and costs.

Count II

1-9. Plaintiff herein incorporates by reference paragraphs 1 through 9 of Count I as paragraphs 1 through 9 of Count II.

10. On May 16, 1960, plaintiff was lawfully operating as a common carrier in Colorado and elsewhere. On or about that date, defendants entered into a conspiracy or combination with its members and officers for the purpose of hindering and preventing plaintiff from carrying on its duties and lawful business as a common carrier in that defendants wilfully and without excuse caused an illegal strike or concerted work stoppage on plaintiff's railroad lines.

11. Plaintiff hereby incorporates by reference paragraph 11 of Count I, as paragraph 11 of Count II.

Wherefore, The Denver and Rio Grande Western Railroad Company prays that it have judgment on Count I of its Complaint, or, in the alternative, on Count II of its Complaint against the defendants herein, in the sum of $50,000.00.

Ray Garrett, T. A. White, William M. McGovern, Jr., Kenneth D. Barrows, Attorneys For Plaintiff.

Sidley, Austin, Burgess & Smith.

[fol. 9]

IN THE UNITED STATES DISTRICT COURT

MOTION OF DEFENDANTS TO STRIKE OR DISMISS AMENDED COMPLAINT—Filed March 1, 1963

Now come the defendants in the above-entitled cause and move the Court as follows:

1. To strike the amended complaint on the ground that the amendment adds new parties defendants and that under Rule 21 of the Federal Rules of Civil Procedure such an amendment may not be made by the plaintiff except on order of the Court in response to a motion by plaintiff;

2. To dismiss the amended complaint as to the individually named defendants pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the ground that officers, agents, or members of a labor organization may not be named as defendants in a suit for damages based on an alleged illegal strike;

3. To dismiss the amended complaint under Rule 12(b) of the Federal Rules of Civil Procedure on the ground of improper venue;

4. To dismiss the amended complaint under Rule 12(b) of the Federal Rules of Civil Procedure on the ground that it fails to set forth a valid class action as a basis for a class suit against the Brotherhood;

5. To dismiss the amended complaint under Rule 12(b) of the Federal Rules of Civil Procedure on the ground that it shows on its face that the claim set forth therein is barred by the applicable Colorado statute of limitations; and

6. To dismiss the amended complaint under Rule 12(b) of the Federal Rules of Civil Procedure on the ground that it fails to set forth a claim upon which the relief prayed for can be granted.

There is attached to this motion a supporting memorandum of points and authorities.

Respectfully submitted,

Philip Hornbein, Jr., James L. Highsaw, Jr., Attorneys for Defendants.

March 1, 1963

[fol. 10] AFFIDAVIT OF R. E. CARROLL

R. E. Carroll, of lawful age, being first duly sworn upon his oath deposes and says:

1. Affiant is one of the above named defendants and is chairman of the General Grievance Committee of the Brotherhood of Railroad Trainmen for the Denver and Rio Grande Western Railroad system.

2. The plaintiff employs numerous members of the defendant Brotherhood of Railroad Trainmen who reside in the State of Utah and whose regular work is not ordinarily under the jurisdiction of any local lodge of the Brotherhood of Railroad Trainmen in Colorado. The aforesaid employees are represented in their relationship and dealings with the plaintiff by the chairmen of their own local lodges in the State of Utah.

3. The defendants Roark, Myers, Crocker, Ahrens, Doolittle and Feather, who are chairmen of local lodges

in the State of Colorado, do not represent the aforesaid employees in any matters concerning work under the jurisdiction of the local lodges in the State of Utah.

4. Some of the plaintiff's employees who work in Utah are represented by the defendant Brown. Other of plaintiff's employees who work in Utah are represented by one, Herman Gall, a resident of the State of Utah.

5. Further affiant sayeth not.

R. E. Carroll.

State of Colorado, City and County of Denver; ss.; Subscribed and sworn to before me this 29th day of April, 1963, by R. E. Carroll.

My commission expires January 6, 1965.

Alberta C. Walters, Notary Public.

(Seal)

Filed April 30, 1963.

[fol. 11]

IN THE UNITED STATES DISTRICT COURT

ORDER ON MOTIONS—Entered August 30, 1963

This cause came on the motions and the briefs of the respective parties, and after due consideration, it is Ordered As Follows:

1. That the Plaintiff is granted leave to add the individual defendants as parties defendant to this action.

2. That the defendants' Motion to Strike or Dismiss the Amended Complaint be overruled.

Dated at Denver, Colorado this 29th day of August, 1963.

By The Court: Orie L. Phillips, Circuit Judge Assigned.

In the United States District Court

Answer to Amended Complaint—Filed September 20, 1963

Come Now the defendants and answer the amended complaint as follows:

First Defense: The allegations of the amended complaint do not state a claim on which relief can be granted.

Second Defense: Venue does not lie in this judicial district for action against the defendant Brotherhood of Railroad Trainmen.

Third Defense: This action is barred by the applicable provisions of the Colorado Statute of Limitations.

Fourth Defense: The court has no jurisdiction over the subject matter of Count II of the amended complaint.

Fifth Defense: As a fifth and further defense, defendants admit, deny and allege as follows:

As to the allegations of Count I:

1. Defendants admit the allegations of paragraph 1 of Count I of the amended complaint.

[fol. 12] 2. Defendants admit the allegations of the first and third sentences of paragraph 2 of Count I of the amended complaint. Defendants aver that the second sentence of such paragraph constitutes a legal conclusion which they are not required to answer. To the extent that an answer may be required, defendants deny the allegation in such sentence.

3. Defendants deny the allegations of paragraph 3 of Count I of the amended complaint.

4. Defendants admit the allegation[s] of the first sentence of paragraph 4 of Count I of the amended complaint. Defendants deny the allegations of the second sentence of such paragraph.

5. Defendants admit that on or about February 15, 1953, the Brotherhood of Railroad Trainmen submitted to the First Division of the National Railroad Adjustment Board pursuant to Section 3 First (i) of the Railway Labor Act the claims described in Award 19389 and that such claims were sustained by that award. Except to the extent thus specifically submitted, defendants deny the allegations of paragraph 5 of Count I of the amended complaint.

6. Defendants admit that on or about March 3, 1953, the Brotherhood of Railroad Trainmen submitted to the First Division of the National Railroad Adjustment Board pursuant to Section 3 First (i) of the Railway Labor Act the claims described in Award 19372 and that such claims were sustained by that award. Except to the extent thus specifically admitted, defendants deny the allegations of paragraph 6 of Count I of the amended complaint.

7. Defendants admit the allegations of the first sentence of paragraph 7 of Count I of the amended complaint. Defendants aver that the allegations of the second sentence of such paragraph constitute legal conclusions of the plaintiff which defendants are not required to answer.

8. Defendants deny the allegations of paragraph 8 of Count I of the amended complaint.

9. Defendants deny the allegations of paragraph 9 of Count I of the amended complaint.

10. Defendants aver that the allegations of paragraph 10 of Count I of the amended complaint constitute legal [fol. 13] conclusions which defendants are not required to answer. To the extent that an answer may be required to the allegations of such paragraph they are denied.

11. Defendants deny the allegations of paragraph 11 of Count I of the amended complaint.

12. Defendants deny the allegations of paragraph 12 of Count I of the amended complaint.

As to the allegations of Count II:

1-9. Defendants incorporate by reference their answers to paragraphs 1 through 9 of Count I of the amended complaint as answers to these paragraphs as realleged by plaintiff as paragraphs 1 through 9 of Count II of the amended complaint.

10. Defendants admit the allegations of the first sentence of paragraph 10 of Count II of the amended complaint. Except to the extent thus specifically admitted, defendants deny the allegations of such paragraph.

11. Defendants deny the allegations of paragraph 11 of Count II of the amended complaint.

Wherefore, defendants pray that judgment be granted defendants on the amended complaint.

Philip Hornbein, Jr., James L. Highsaw, Jr., Attorneys for the Defendants.

IN THE UNITED STATES DISTRICT COURT

INTERROGATORIES TO BE ANSWERED BY PLAINTIFF—
Filed November 29, 1963

The defendants in the above-entitled action require the plaintiff to answer fully in writing, under oath, pursuant to Rule 33 of the Federal Rules of Civil Procedure the following interrogatories:

1. Name the specific defendant who notified plaintiff that members of the Brotherhood of Railroad Trainmen would withdraw from the service of plaintiff Railroad beginning at 2:00 p.m. on May 16, 1960, as alleged in paragraph 9 of Count I of the Amended Complaint.

[fol. 14] 2. State whether such notification was made orally or in writing.

3. If the notification was made orally, give the name of any witnesses thereto.

4. List the name or names of the officials of the plaintiff to whom such notification was given.

5. List the exact time, as far as possible, that the strike ended.

6. List by number or other appropriate identification passenger trains of the plaintiff which were scheduled to operate between 2:00 p.m. and 10:00 p.m. on May 16, 1960.

7. State which of said trains did not in fact operate because of the strike alleged in the Complaint.

8. Set forth the amount of gross revenue which plaintiff claims was lost as a result of the trains listed in response to question 7 not operating.

9. Furnish a breakdown as to the amount given in response to question 8 as between: (a) Passenger revenue; (b) Mail revenue; (c) Express revenue; (d) Other revenues (identify).

10. State how the amounts set forth in response to questions 8 and 9 were calculated.

11. Set forth the cost to plaintiff of operating the trains listed in response to question 7 if such trains had operated according to schedule.

12. List by number or other appropriate identification freight trains of the plaintiff which were scheduled to operate between 2:00 p.m. and 10:00 p.m. on May 16, 1960.

13. State which of said trains did not in fact operate because of the strike alleged in the Complaint.

14. Set forth the amount of gross revenue which plaintiff claims was lost as a result of the trains listed in response to question 13 not operating.

[fol. 15] 15. State how the amounts set forth in response to question 14 were calculated.

16. Set forth the cost to plaintiff of operating the trains listed in response to question 13 if such trains had operated according to schedule.

17. Give approximately the total number of employees of plaintiff on May 16, 1960.

18. State how many of the employees listed in response to question 17 above were not paid for the period of the strike alleged in the Complaint.

19. State the approximate amount, if any, of wages and salaries of employees of the plaintiff that was not paid because of the strike of employees alleged in the Complaint.

20. Set forth the approximate amount of total loss, if any, which plaintiff claims resulted from the strike alleged in the Complaint not covered by questions 8 and 14 above.

21. Furnish a breakdown of the amount given in response to question 20 by type of loss.

22. Set forth how the amount or amounts furnished in response to questions 20 and 21 were calculated.

23. Furnish the names of officers of the plaintiff Railroad who are familiar with the facts alleged in the Complaint.

Philip Hornbein, Jr., James L. Highsaw, Jr., Attorneys for Defendant.

November 27, 1963.

IN THE UNITED STATES DISTRICT COURT

PLAINTIFF'S ANSWERS TO DEFENDANTS' INTERROGATORIES—
Filed February 14, 1964

Comes now the plaintiff and in answer to defendants' Interrogatories states and alleges:

1. Messrs. Carroll and McDonald.

2. Said notification was in writing, a copy of which is plaintiff's Exhibit No. 2.

3. No answer.

[fol. 16] 4. L. H. Hale, Vice President.

5. The strike ended at various times over the plaintiff's system. The pickets were removed in Denver at approximately 8:30 P.M., May 16, 1960; and in Salt Lake City and vicinity at approximately 10:30 P.M., on May 16, 1960.

6. Passenger Trains No. 7 and 8, 17 and 18 and 3 were scheduled to operate between 2 P.M. and 10 P.M. on May 16, 1960.

7. All passenger trains operated on May 16, 1960, but all were delayed.

8. No answer.

9. No answer.

10. No answer.

11. No answer.

12. All freight trains scheduled to depart stations between 2 P.M. and 10 P.M. on May 16, 1960 were operated after the strike terminated.

13. All trains operated but were late.

14. No answer.

15. No answer.

16. No answer.

17. Approximately 4,500 employees.

18. The plaintiff does not have any record showing how many of its employees were not paid for the period of the strike. It is the plaintiff's belief that all employees that desired to, worked on the day of the strike.

19. The plaintiff has no record of the information called for in this interrogatory.

20. See attached Exhibit "A".

21. See attached Exhibit "A".

22. See attached Exhibit "A".

23. All officers of the plaintiff Railroad Company were familiar with the strike when it occurred. These include: Mr. L. H. Hale, then Vice President; Mr. R. K. Bradford, Vice President; Mr. E. B. Herdman, Director of Personnel; Mr. T. A. White, General Attorney; Mr. Harold Burnaugh, Asst. to Vice President Bradford.

Kenneth D. Barrows, Attorney for Plaintiff.

Affidavit

State of Colorado,
City and County of Denver, ss.:

I, Kenneth D. Barrows, being duly sworn depose and say that I am an Assistant General Attorney of The Den- [fol. 17] ver and Rio Grande Western Railroad Company; and that the answers to the above interrogatories were obtained by me through my own investigation in various departments of the plaintiff Railroad Company. The answers are true to the best of my knowledge and belief.

Kenneth D. Barrows.

Subscribed and sworn to before me this 27th day of January, 1964.

Helen R. Broderick, Notary Public.

(Seal)

My commission expires June 12, 1966.

Filed February 14, 1964.

EXHIBIT "A" TO ANSWER TO INTERROGATORIES

Estimated Loss Of Revenue Sustained By The Denver And Rio Grande Western Railroad Company Resulting From Brotherhood Of Railroad Trainmen Strike

Ford Motor Company—	
May 19, 1960 to June 4, 1960, auto parts diverted. D&RGW gross revenue	$ 27,091
May 19, 1960 to May 27, 1960, Piggyback movement of automobiles to Salt Lake City diverted. 178 cars @ $558 per car	99,324
May 19, 1960 to May 27, 1960, Piggyback movement of automobiles from Milpitas to Dallas, Houston and Kansas City diverted 21 cars @ $187 17 cars @ 225 38 cars	7,752
Gross Revenue loss from Ford Motor Company	$134,167
General Electric—Louisville to General Electric, Salt Lake—2 cars @ $331	662
Kennecott Copper—Garfield, Utah to Baltimore 10 cars @ $223	2,453
[fol. 18]	
Ruberoid—Denver—roofing to Salt Lake 2 cars @ $511	$ 1,022
Chicago Bridge & Iron—Salt Lake Steel from Chicago area 8 cars @ $598	4,784
Commercial Shearing & Stamping—Salt Lake Steel from Chicago area 6 cars @ $598	3,588

Welch Planing Mill—Midvale			
Lumber to Wisconsin points			
3 cars @ $310			930
			$147,606

	1960		
M of W	10.44		
M of E	15.09		
Trans	32.14		
	57.67—42.33%	Net	$ 62,482
Total	66.24		

IN THE UNITED STATES DISTRICT COURT

MOTION TO AMEND ANSWER—Filed December 17, 1963

Come Now the defendants and move for leave to amend their Answer by adding thereto a sixth defense, reading as follows:

"Sixth Defense: "As a sixth and further defense, defendants allege that the plaintiff failed to take reasonable measures to prevent or mitigate its alleged damage, and that any damage which the plaintiff may have sustained is the result of the plaintiff's failure to take such action."

James L. Highsaw, Philip Hornbein, Jr., Attorneys for Defendants.

[fol. 19]

IN THE UNITED STATES DISTRICT COURT

DEFENDANTS' PRE-TRIAL STATEMENT—
Filed December 17, 1963

1. Defendants rely on all defenses set forth in their answer to the amended complaint.

2. The defendants contend that the plaintiff failed to take reasonable measures to mitigate its alleged damage.

3. Defendants generally deny that any damages were sustained by the plaintiff as a result of any acts of defendants.

4. Defendants deny that they can be held liable for the failure on the part of the plaintiff's customers to utilize the plaintiff's services unless such failure was directly instigated by the defendants.

5. Defendants contend that they cannot be held liable for actions taken by third persons, over whom they have no control, by reason of a notice sent to the National Mediation Board.

6. In all matters referred to in the amended complaint, defendants acted in good faith and in accordance with what they reasonably considered to be their lawful rights. Under these circumstances it would be unlawful and unjust to assess damages against defendants.

7. Defendants will call such witnesses and offer such exhibits as may be necessary to refute plaintiff's evidence.

James L. Highsaw, Philip Hornbein, Jr., Attorneys for Defendants.

IN THE UNITED STATES DISTRICT COURT

PLAINTIFF'S PRE-TRIAL STATEMENT
STATEMENT OF FACTS—Filed December 17, 1963

This is a class action by plaintiff, a common carrier by railroad, against the Brotherhood of Railroad Trainmen and the members of the defendant Brotherhood employed by the plaintiff.

On or about April 12, 1960, the plaintiff Railroad Company was notified by Mr. E. C. Thompson, Executive Secre- [fol. 20] tary of the National Mediation Board, that they had received a telegram from the defendant Brotherhood stating: "Account failure management D&RGW Railroad to apply NRAB First Division Awards 19372 and 19389 have authorized the men we represent that property withdrawn from service 2:30 P.M. Mountain Standard Time April 15, 1960." This strike notice against the plaintiff Railroad was given local and national newspaper coverage. Upon receipt of the above-mentioned telegram notification the plaintiff filed Civil Action No. 6763 in this Court and obtained a temporary restraining order after which the National Mediation Board proffered its services. The plaintiff and defendants accepted the proffered mediation of the National Mediation Board and met in Denver, Colorado, on or about April 26, 1960. The parties to the mediation could not agree and therefore on May 13, 1960 the National Mediation Board advised both parties that further mediatory efforts were not warranted and that the Board was closing its file on the case.

At 1:35 P.M. on May 16, 1960, defendant R. E. Carroll, being the General Chairman of the Brotherhood of Railroad Trainmen, and R. H. McDonald, Vice President of the Brotherhood of Railroad Trainmen, caused a letter to be delivered by Western Union addressed to Mr. L. H. Hale, Vice President and General Manager of The Denver and Rio Grande Western Railroad Company, advising their members would withdraw from service at 2 P.M. on May 16, 1960.

The defendants at 2 P.M. on May 16, 1960, left the plaintiff's employ and caused picket lines to be put up on the plaintiff's property thereby forcing the plaintiff to cease its operation as a common carrier by railroad.

The plaintiff immediately filed its complaint in this Court against the defendants, being Civil Action No. 6796, praying for a temporary restraining order and preliminary injunction to be made permanent on final hearing restraining and enjoining the defendants from conducting the strike and paralyzing the plaintiff's operation.

This Honorable Court granted said temporary restraining order on May 16, 1960 and thereafter entered the temporary injunction and permanent injunction. See The Denver and Rio Grande Western Railroad Company v. Brotherhood of Railroad Trainmen, et al (Colorado) 185 F.Supp. 369; Brotherhood of Railroad Trainmen, et al vs. The Denver and Rio Grande Western Railroad Company (United States Court of Appeals 10th Circuit 1961) 290 F.2d 266; certiorari denied, 81 S.Ct. 1925, 366 U.S. 966, 6 L.Ed.2d 1256, rehearing denied 82 S.Ct. 28, 368 U.S. 873, 7 L.Ed.2d 73.

[fol. 21] This Honorable Court and the 10th Circuit Court of Appeals held that the strike conducted by the defendant Brotherhood and its respective members and which continued for approximately nine hours, was illegal because in disputes of this nature the statutory remedy as contained in 45 U.S.C.A., Section 153, 1st (p) is exclusive.

That as a result of the two illegal strike notices and the strike which continued for approximately nine hours, serious, substantial and irreparable injury was caused to the plaintiff for which it seeks damages herein.

Stipulations

Stipulations of the parties hereto will be submitted to the Court by separate memoranda.

Witnesses

The plaintiff may call the following witnesses to testify:

1. Mr. E. B. Herdman, Director of Personnel, 1531 Stout Street, Denver 17, Colorado.

2. Mr. Ray Burris, Chief Special Agent, 1531 Stout Street, Denver 17, Colorado.

3. Mr. G. F. Fitz-William, General Freight Agent, 1531 Stout Street, Denver 17, Colorado.

The plaintiff will also call traffic managers from several large shippers throughout the United States to testify regarding the number of cars their respective companies diverted from The Denver and Rio Grande Western Railroad Company because of the threatened strike and later strike.

The plaintiff requests leave of Court to endorse additional witnesses on or before 30 days before trial.

Documentary Evidence

The plaintiff has no documentary evidence to present at this time, but requests leave of Court to file documentary evidence on or before 30 days in advance of trial.

[fol. 22] Contested Issues of Fact and Law

1. This Court, and the 10th Circuit Court of Appeals, have held the strike notices and resulting strike called by the defendants was illegal. Therefore there is no question of fact or law remaining in this respect.

2. The plaintiff submits the only issue remaining in this case is the amount of damages suffered by plaintiff as a result of the defendants' actions.

Respectfully submitted,

T. A. White, Kenneth D. Barrows, Attorneys for Plaintiff.

IN THE UNITED STATES DISTRICT COURT

Pre-Trial Conference—December 17, 1963

Court Room "C", U. S. Post Office Building, Denver, Colorado.

The above-entitled matter came on for hearing on the 17th of December, 1963, before the Honorable William E. Doyle, Judge.

APPEARANCES: For the Plaintiff: Kenneth D. Barrows; For the Defendant: James L. Highsaw, Jr. and Philip Hornbein, Jr.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: You will be doing the pre-trial order.

Mr. Barrows: I guess so. It is rather unusual for me.

The Court: Do you have a memorandum setting forth your theories?

Mr. Barrows: Yes, sir.

The Court: Do you have a memorandum?

Mr. Highsaw: Yes, sir.

The Court: Does this involve damages during the work stoppage of nine hours or something of that kind?

[fol. 23] Mr. Hornbein: Presumably, that's what we understand.

Mr. Barrows: It goes a little deeper than that, Judge. You see, when an organization such as the Brotherhood serves a strike notice upon a carrier, shippers re-route their shipments so they do not get caught on the carriers' territory, because, of course, they do not want the shipment held up, so we are not limiting our damages in this case—

The Court: I wasn't asking you the scope of your claims, but I take it you maintain there are certain consequential damages—

Mr. Barrows: Definitely, very definitely.

The Court: Is there any real dispute about the facts in this case?

Mr. Barrows: I do not believe there is any dispute as to the facts. There may be on this matter of damages.

Mr. Highsaw: I think, Your Honor, on the question of strike, there is a dispute as to this. First, of course, there is no dispute that these notices that they refer to here were served. The question is whether all of the defendants that are named in the complaint were involved in this, and had any part in it. We say that some of them didn't.

The second thing is that we have served interrogatories on the railroad directed basically at finding out just what the claim of damages was for this 8 hour period and as we understood it, the railroad trains that were scheduled to run during that period, although some of them were delayed, some of them actually ran and their claim for damages is going to relate to this diversion of shipment after this notice of April 12, 1960 was sent to the National Mediation Board.

The Court: How do you prove those damages?

Mr. Barrows: The only way—we intend offering some shipper witnesses who will testify as to what shipments they would have routed over the Rio Grande had it not been for these strike notices that were out. Incidentally, one question, Jim, our trains did not run during the strike except for the California Zephyr. All of the others were tied up in the yards, but they did run after the strike was over.

[fol. 24] The Court: Did you reject any shipments?

Mr. Barrows: Not that I know of. We didn't reject any; we just didn't get them.

The Court: Well, all of your damages will be evidence of this character?

Mr. Barrows: That's right.

The Court: In other words, shipments that you maintain you would have had had it not been for this work stoppage; is that right?

Mr. Barrows: That's right.

The Court: The only other issue in the case is personal responsibility of these several defendants?

Mr. Highsaw: We are—our position also, Your Honor, is that we didn't know until yesterday when we talked with

counsel for the railroad as to what their claim of damages was going to be since interrogatories hadn't been answered yet. Their reliance on this notice of April 15, 1960, which was sent to the Mediation Board, there was not a notice that was sent to the railroad nor was it a public notice. It is our position that was not a strike notice. It is a notice sent to the Mediation Board to invoke their services; consequently, anything that anybody did after that notice is not the responsibility of any of these defendants.

It is also our position that as soon as the Mediation Board took jurisdiction, if not at the time this Court issued its temporary restraining order, that that notice became null and void and the matter was then in the hands of the National Mediation Board which continued jurisdiction.

The Court: Who sent the telegram?

Mr. Highsaw: Some officers of the Brotherhood of Railroad Trainmen.

The Court: You don't maintain that the sending of the telegram was not authorized?

[fol. 25] Mr. Highsaw: We don't say that sending the telegram was not authorized. We say it was not a strike notice, that it was a notice that was sent to the National Mediation Board.

The Court: Did anybody call a strike here at all?

Mr. Highsaw: Not under this notice. Now, Your Honor, the strike that was subsequently called was over a month afterwards, after the Mediation Board had relinquished jurisdiction and pursuant to a letter that was sent to the railroad on May 16 and between the time the railroad got that and between the time that this 8 hour strike took place, there couldn't have been any diversion of traffic. Now, Your Honor, it would be our position, and it is our position, that aside from what the evidence may show as to this period between April 12 and May 16, that we are not liable, that is, my clients are not liable for any damages, legally, that the railroad may claim for diversion of shipments during that period of time.

The Court: This will be a legal question?

Mr. Highsaw: That's right.

The Court: If there is any causal relationship between the calling of this strike and any injury which they suffered?

Mr. Highsaw: We are also taking the position, Your Honor, we would want—we would like to amend the answer, like leave to amend our answer so we can take the position which is in part based on the information we got from the carrier, yes, sir.

The Court: Any objection to this?

Mr. Barrows: I don't think it is material to the facts, but it is not an objection.

The Court: Very well, the amendment will be allowed.

Mr. Barrows: I have a few questions I would like to ask about it.

The Court: We will get to that in a minute. Now, is there anything preliminary here at all in the way of motions or anything, any amendments?

[fol. 26] Mr. Barrows: Yes, there is, Judge. Not in the sense that you mean, but the first four defenses contained in the Brotherhood's answer were all briefed, argued and overruled by Judge Phillips, so, could the pre-trial order show the overruling of these defenses here?

The Court: Well, I think it would be proper to show that a motion was granted—did he strike them?

Mr. Highsaw: No, we moved to dismiss the complaint based on these.

The Court: I think the pre-trial order should merely show what the order was; that the Judge denied the motion to dismiss which was based upon these defenses.

Mr. Barrows: Yes.

The Court: And whether that ends the matter of the defenses, I am not sure. You maintain that it does?

Mr. Barrows: In the trial of this case, are we going to re-litigate all of these four defenses that have been ruled on by Judge Phillips?

The Court: Whatever has been ruled on is the law of the case. It is purely a question of what he ruled on, what the effect of his ruling was. Does this end the first four defenses as far as you are concerned?

Mr. Highsaw: I think that's correct. I just have one slight caveat about it, Your Honor; that is, the second defense of venue. I believe that there were affidavits and other material submitted to the Court which would be sufficient if an appeal became involved in this case so that those facts would be before the Court, that's the only question I have in my mind, the necessity for us putting in evidence, in the record, which would serve as a basis for subsequently appealing it.

The Court: Surely these questions are going to be reserved to you on appeal?

Mr. Highsaw: I agree with Mr. Barrows that there is no necessity for re-litigating them before Your Honor.

[fol. 27] The Court: Very well, fine. Then you might tell the story on this in the pre-trial order that there may be some evidence in regard to the second defense, but this is merely because of the fact that the defendants do not want to waive their right to question this and in its best light on appeal.

Mr. Highsaw: In other words, Ken, we ought to take a good look at all the papers and if it—well, let me ask Your Honor, would the affidavits that were attached to the motions that were ruled on by Judge Phillips, if they were appealed, would that be considered part of the record?

The Court: I think you designate it as a basis for your appeal.

Mr. Highsaw: I will take a look at it, Ken, and maybe there won't be any evidence at all required in the light of that, very little, anyway, that would be the only one of those defenses that would be.

The Court: Any further discovery contemplated here?

Mr. Hornbein: Yes.

Mr. Highsaw: We have interrogatories which the carrier has now but he is working on them and we are per-

fectly willing to give them whatever time they feel is necessary. They do involve getting into some records, a lot of record material.

The Court: How long will it take?

Mr. Barrows: I was going to ask the Court for another 30 days on them and include this extension in the pre-trial order.

The Court: Will this take care of all the discovery?

Mr. Highsaw: I doubt—

The Court: How much time do you want to complete all discovery? 60 days?

Mr. Hornbein: It is going to depend in part on when we get the names of the plaintiffs' additional witnesses which they would endorse. We will probably want to take their depositions, these witnesses. I am referring to traffic managers for the shippers that the railroad claims they lost freight from.

[fol. 28] The Court: How much time do you think it is going to take?

Mr. Hornbein: I would say at least 45 days after we get the names of these witnesses from them.

The Court: When will you furnish the names?

Mr. Barrows: Just as quickly as possible.

The Court: 15 days?

Mr. Barrows: I don't know if I can furnish them all that soon because I want to re-contact all of these shippers.

The Court: 20 days?

Mr. Barrows: Make it 30 days.

The Court: 25. Okay, 30 is all right, and then you will have 45 days, let's see, you will have a total of 75 days to take these depositions or 35 days after—45 days. He may furnish them prior to the 30 day period, if he has them. Is this a trial to court?

Mr. Hornbein: Yes.

Mr. Barrows: Yes, it is.

Mr. Hornbein: We also may want to move for the production of certain records of the plaintiff after we get their—

The Court: You pursue any discovery you like during this period, I think, you may have more discovery, too.

Mr. Barrows: We may, yes.

The Court: How long will it take to try this case finally?

Mr. Barrows: I actually wouldn't think over two days, once we get it boiled down.

Mr. Highsaw: I guess we might get it out of the way in one.

[fol. 29] Mr. Barrows: There is still a lot of preliminary work to do, Judge. Actually, as you probably know, all of us here have been still involved in these continuing enforcement suits going out of this, too, by the Brotherhood against the Railroad, and the appeal of those and I am afraid this one is just kind of slipping by.

The Court: Any chance that the case will be settled?

Mr. Barrows: I don't know. We discussed it yesterday. I didn't see much likelihood.

Mr. Highsaw: I don't believe so.

The Court: Do you have any exhibits to be marked?

Mr. Barrows: I would like to mark this. Now this is a—I could not find the original letter from Mr. Carroll to make good copies, so I just had it typed.

The Court: Give it to the Clerk.

Mr. Barrows: You can confirm that and the same thing with this telegram. I just couldn't get good copies. It is easier to read a typewritten copy.

The Court: Can you stipulate to the authenticity of these documents?

Mr. Highsaw: Yes, we will stipulate them. I would like to check the exact language against the documents in our file, but there is no question about the authenticity or necessity of producing the original document.

The Court: Do you have any exhibits to offer?

Mr. Highsaw: Not at this time, Your Honor.

The Court: Each side will have 20 days prior to trial within which to tender exhibits, additional exhibits, furnishing the other side with a copy thereof. Do you have

any questions about the testimony of the witnesses listed? Are they—do you have a list of witnesses by the way?

[fol. 30] Mr. Hornbein: Not at this time, Your Honor.

Mr. Highsaw: I think it is going to depend almost entirely on their answer to the interrogatories with respect to the damage matter because there is going to be no factual dispute about the other aspects of it, mostly legal argument.

The Court: Do you have any question about the testimony of Herdman, Burris, or Fitz-William, the ones listed by the plaintiff?

Mr. Highsaw: What are Mr. Burris and Mr. Fitz-William going to testify about?

Mr. Barrows: Mr. Burris is, of course, Chief Special Agent. He would testify as to the duration of the actual strike, the time the pickets were removed, such as that; if it is necessary, perhaps we can stipulate that.

Mr. Highsaw: One thing I might suggest is that if you could get up a statement of what your views are to the duration and so forth, we will then check and maybe we can stipulate. We discussed this yesterday and our problem then was that on our side none of us know precisely and exactly; for example, we don't know how many men—we know that some men didn't report for service and we know there were some pickets at some places. We know that this ended at some time that evening, but we don't know exactly and precisely when. If Mr. Barrows can get up a statement, I am sure we can probably arrive at a stipulation and eliminate the necessity of that testimony.

Mr. Barrows: You ought to read your client's newspaper. It is all in there.

Mr. Highsaw: Maybe that's a good place to get it.

The Court: Will you write up some statement of the facts—

Mr. Barrows: It would only be as to the duration because witnesses like Fitz-William, why, I endorsed him is because he would be the one to tell what the Rio Grande's loss was, revenue loss from the number of cars a shipper

would use which he would say were diverted from the Rio Grande and I couldn't work up anything on him. Mr. Burris, I probably could, I could give you the times these pickets were removed.

[fol. 31] The Court: Each side can name additional witnesses at any time 20 days prior to trial. There should be a brief statement as to the testimony of such witnesses.

Mr. Hornbein: Now, with the exception of these witnesses that are going to testify as to the failure of shippers to send freight over the Rio Grande, and I understand we are going to get their names within 30 days—

The Court: Yes, there is a specific order on that. I don't know that there is anything else we can accomplish here now, gentlemen.

Mr. Barrows: I wanted to ask a question, a couple of questions, about this sixth defense. You allege here "that the plaintiff failed to take reasonable measures to prevent or mitigate its alleged damage, and that any damage which the plaintiff may have sustained is the result of the plaintiff's failure to take such action."

What do you have in mind on that; what is the basis of this?

Mr. Highsaw: We have in mind what measures, if any, you did or did not take with respect to this notice of April 12 advising your shippers of what action you did or didn't take, advising them about the obtaining of the temporary restraining order and what other actions you might have taken in the interim with your shippers. That's primarily what we had in mind in connection with this. Up until yesterday we had thought that based on the complaint the claim of damages was going to be a claim of damages for loss of revenue and during the period of the work stoppage which presented somewhat different problems from the one that we have now and that's what we have in mind, because we would take the position that, for example, that you couldn't claim damages for "X" company not diverting freight if you hadn't made reasonable efforts to tell them you had a restraining order, and the Mediation Board moved in under the law and there couldn't be anything

happen for a month—until after a period of time after the Mediation Board relinquished the jurisdiction. We think you had an obligation to do that. If you didn't, you can't claim damages for somebody not sending shipments over the railroad.

Mr. Barrows: Does this defense apply only to the April 12 notice then?

[fol. 32] Mr. Highsaw: Well, it might apply to the May 16, depending on what—well, frankly, at this moment we don't have anything in mind with respect to the May 16 unless some facts that I am not aware of at the moment develop because there was so little time between the time you had the May 16 notice and the time of the strike, the strike actually took place, that I think only—

Mr. Hornbein: If the plaintiffs claim any damages subsequent to May 16, why, then, we certainly would.

Mr. Highsaw: That's right, you got the restraining order that afternoon and if there was any damage based on say May 16 and May 25 or something like that, we would take the same position.

Mr. Barrows: Do you claim that we had any duty to mitigate if shippers said, "Well, during this transition period between the temporary restraining order the temporary injunction we just won't ship."

Mr. Highsaw: We take the position, of course, if you say, as you say in this paper here, that we can't be held liable for the failure on the part of your customers to ship unless we did something directly to instigate this, but aside from that, just this defense here. If you had notified them of these things, you might have taken the action to mitigate as far as these claims of damages are concerned. That's what this is directed to.

Mr. Barrows: Well, in the first part of your statement you referred to—you weren't certain that all of the named defendants were involved in this calling of the strike and serving the notice and as you know, the original complaint in this case was only filed against the Brotherhood and

against your motion that these additional ones were named as defendants to get at the Brotherhood itself.

Mr. Highsaw: To get around the venue problem.

Mr. Barrows: Do your defenses apply to the Brotherhood as such as well as to the individual ones or were you just referring to the individual defendants?

Mr. Highsaw: We were referring to the individual defendants. We are not relying on any contention that these notices here were not authorized or approved by the Brotherhood.

[fol. 33] Mr. Barrows: In as far as the legal issue on the Brotherhood, do we have anything except the question of damages?

Mr. Highsaw: Yes, we have the same questions that we have raised, namely, the question of whether we can be liable at all for damages during the period that you are talking about. We don't have any factual issues, if that's what you mean.

Mr. Barrows: It's just a question of damages. Damage causation.

The Court: Remoteness as to the defendants in relation to damages, is that right?

Mr. Highsaw: Yes. It might well become important if there was an appeal taken; for example, on some of these individual defendants. That's why we are taking the position as far as I can see. Any of the documents that have been produced would only show that Mr. Carroll was the only one who had any connection with it at all.

Mr. Barrows: These individual defendants wouldn't be in here if it hadn't been for your motion as to question of service of process upon the Brotherhood.

Mr. Highsaw: That's not quite accurate because the Railroad in the memorandum filed on the Railroad's behalf in opposition to our motion justified the naming of these defendants among others, saying that it might turn out that these individuals were the people who were responsible for this action and that it was unauthorized Brotherhood of Railroad Trainmen and had nothing to do with it.

Mr. Barrows: That was before your statement here that the notices and things did have the authority of the Grand Lodge. I am just wondering about the possibility of letting these individual ones out.

Mr. Highsaw: I can't let them out and agree that you have got venue, if that's what you want. I want to preserve our venue.

The Court: Anything further, gentlemen? I think that's all.

[fol. 34] Mr. Barrows: Since we are going to do some work before this pre-trial order is filed or perhaps further agreements between the parties here could we have a little more time to file a pre-trial order than usual?

The Court: I will give you 30 days.

Mr. Barrows: I think 30 days is sufficient.

The Court: If you need any more time, we will give it to you.

It is not a complex pre-trial order; I don't think there is any dispute as to the facts.

Filed February 14, 1964.

[fol. 52]

IN THE UNITED STATES DISTRICT COURT

PRETRIAL ORDER—Entered February 14, 1964

Pretrial conference was held herein on Tuesday, December 17, 1963, before Honorable William E. Doyle, in chambers. Kenneth D. Barrows appeared on behalf of plaintiff: and James L. Highsaw and Phillip Hornbein, Jr. appeared on behalf of defendants. The following matters were agreed to as and for pretrial orders herein:

1. Jurisdiction: Jurisdictional issues were raised by the defendants in their motion filed on or about December 24, 1962. This matter was briefed by the parties herein and on August 29, 1963, Orie L. Phillips, Circuit Judge assigned, overruled defendants' motions. The defendants

have raised jurisdictional issues in their Second and Fourth Defense as contained in their answer. Since these matters have already been ruled upon, they will not be relitigated at the time of trial, but they are not waived by defendants and may be raised on appeal.

2. Amendments to pleadings: Leave of Court was requested by defendants and granted by the Court for them to amend their Answer by adding a Sixth Defense. Leave of Court was requested by plaintiff, and granted by the Court, for it to amend its prayer in both alleged counts by increasing it to $62,482.00;

3. Preliminary motions remaining to be determined: None.

4. General nature of the claims of the parties:

(a) Plaintiff's claims:

[fol. 53] (1) This is a class action by plaintiff, a common carrier by railroad, against the Brotherhood of Railroad Trainmen and the members of the defendant Brotherhood employed by the plaintiff.

(2) On or about April 12, 1960, the plaintiff Railroad Company was notified by Mr. E. C. Thompson, Executive Secretary of the National Mediation Board, that they had received a telegram from the defendant Brotherhood stating: "Account failure management D&RGW Railroad to apply NRAB First Division Awards 19372 and 19389 have authorized the men we represent that property withdrawn from service 2:30 P.M. Mountain Standard Time April 15, 1960." (Plaintiff Exhibit No. 2). This strike notice against the plaintiff Railroad was given local and national newspaper coverage. Upon receipt of the above mentioned telegram notification the plaintiff filed Civil Action No. 6763 in this Court and obtained a temporary restraining order, after which the National Mediation Board proffered its service. The plaintiff and defendants accepted the proffered mediation of the National Mediation Board and met

in Denver, Colorado, on or about April 26, 1960. The parties could not agree and therefore on May 13, 1960, the National Mediation Board advised both parties that further mediatory efforts were not warranted and that the Board was closing its file on the case.

(3) At 1:35 on May 16, 1960, defendant, R. E. Carroll, being the General Chairman of the Brotherhood of Railroad Trainmen, and R. H. McDonald, Vice President of the Brotherhood of Railroad Trainmen, caused a letter (Plaintiff Exhibit No. 1) to be delivered by Western Union addressed to Mr. L. H. Hale, Vice President and General Manager of The Denver and Rio Grande Western Railroad Company, advising their members would withdraw from service at 2 P.M. on May 16, 1960.

(4) The defendants at 2 P.M. on May 16, 1960, left the plaintiff's employ and caused picket lines to be established on the plaintiff's property, thereby forcing the plaintiff to cease its operation as a common carrier by railroad.

(5) The plaintiff immediately filed its complaint in this Court against the defendants, being Civil Action No. 6796, praying for a temporary restraining order and preliminary injunction to be made permanent on final hearing restraining and enjoining the defendants from conducting the strike and paralyzing the plaintiffs' operations.

[fol. 54] (6) This Court granted said Temporary restraining order on May 16, 1960, and thereafter, on June 2, 1960, entered the temporary injunction and on July 25, 1960, entered a permanent injunction. See The Denver & Rio Grande Western RR. Co. v. Brotherhood of Railroad Trainmen, et al. (Colo.) 185 F. Supp. 369; Brotherhood of Railroad Trainmen, et al. v. The Denver and Rio Grande Western RR. Co. (U.S. Court Appeals, 10th Circuit, 1961) 290 F.2d 266; certiorari denied 81 S.Ct. 1925, 366 U.S. 966, 6 L. Ed.2d 1256, rehearing denied 82 S.Ct. 28, 368 U.S. 873, 7 L.Ed. 73.

(7) This Court and the 10th Circuit Court of Appeals held that the strike conducted by defendant Brotherhood and its respective members, which continued for approximately nine hours, was illegal because in disputes of this nature the statutory remedy as contained in 45 U.S.C.A. Sec. 153 first (p) is exclusive. That as a result of the two illegal strike notices and the resulting strike which continued for approximately nine hours, serious, substantial and irreparable injury was caused to plaintiff for which it seeks damages herein.

(8) Plaintiff also claims that on or about May 16, 1960, the defendants entered into a conspiracy or combination with its members and officers for the purpose of hindering and preventing plaintiff from carrying on its duties and lawful business as a common carrier.

(b) Defendants' claims:

(1) Defendants rely on all defenses set forth in their answer to the amended complaint.

(2) Defendants contend that the plaintiff failed to take reasonable measures to mitigate its alleged damages.

(3) Defendants generally deny that any damages were sustained by the plaintiff as a result of any acts of defendants.

(4) Defendants deny that they can be held liable for the failure on the part of plaintiff's customers to utilize the plaintiff's services unless such failure was directly instigated by the Defendants.

[fol. 55] (5) Defendants contend that they cannot be held liable for actions taken by third persons, over whom they have no control, by reason of a notice sent to the National Mediation Board.

(6) In all matters referred to in the amended complaint, defendants acted in good faith and in accordance with what they reasonably considered to be their legal rights. Under

the circumstances it would be unlawful and unjust to assess damages against defendants.

(7) Defendants deny that the aforesaid communications were publicized.

(8) Defendants assert that if the aforesaid communications were publicized, such publications did not result from any actions of defendants, and the defendants cannot be held responsible therefor.

(9) Defendants admit that some of the defendants temporarily interrupted their work on May 16, 1960, but deny that all of the defendants or all of the plaintiff's employees interrupted their work, and deny that the plaintiff completely ceased its operations on said date.

(10) Defendants deny that the plaintiff sustained the injuries or damages alleged in the complaint, or any part thereof.

(11) Defendants deny that the communications of April 12, 1960, and May 16, 1960, referred to above, constituted strike notices or were illegal.

(12) Defendants deny that they entered into any kind of conspiracy or contribution for the purpose of hindering or preventing the plaintiff from carrying on its duties or lawful business, or for any other improper objective or purpose.

(13) The defendants assert that if the plaintiff did sustain any injury or damage, the same was not the proximate result of any acts of the defendants, or any of them.

(14) Defendants deny that this Court, or the United States Court of Appeals for the Tenth Circuit, has held that the communications of April 12, 1960 or May 16, 1960, constituted illegal strike notices and deny that either of said courts found or held that the work stoppage occurring on May 16, 1960, caused injury or damage to the plaintiff.

[fol. 56] 5. Uncontroverted facts:

(a) The defendants stipulate as to the authenticity, but not the materiality or relevance, of plaintiff's exhibits Nos. 1, 2, 3 and 4.

(b) The actions taken by the defendants on April 15, 1960, and on May 16, 1960, were authorized by the Brotherhood of Railroad Trainmen.

(c) Any agreement or stipulation that may appear from the transcript of the pretrial conference which is attached hereto and made a part of the pretrial order.

6. Issues of fact and law:

A. Contested Issues of Fact:

(1) Whether or not the plaintiff sustained any damage.

(2) The nature and amount of the plaintiff's alleged damages.

(3) The proximate cause of the alleged damage.

(4) The nature and extent of the publicity, if any, given to the communications of April 12, 1960, and May 16, 1960, and the person or persons responsible for such publicity.

(5) Whether or not the plaintiff took any action to mitigate its alleged damages, and if so, the nature of such action.

(6) Whether or not the plaintiff's actions, if any, to mitigate its alleged damages, constituted a reasonable effort on its part to mitigate such alleged damages.

B. Contested Issues of Law:

The contested issues of law, in addition to those implicit in the foregoing are:

(1) The proximate cause of plaintiff's alleged damages.

(2) Whether or not the communication of April 12, 1960, was illegal.

[fol. 57] (3) Whether or not the communication of May 16, 1960, was illegal.

(4) Whether or not the defendants can be held liable for the plaintiff's alleged damages.

(5) Whether or not the plaintiff took reasonable measures to mitigate its alleged damages.

7. Witnesses:

(a) The plaintiff may call the following witnesses:

(1) Mr. E. B. Herdman

(2) Mr. Ray Burris

(3) Mr. G. F. Fitz-William

(4) Mr. J. K. Speight, Western Traffic Manager, 291 Monadnock Building, San Francisco, California. Mr. Speight will testify regarding the diversion of shipments by shippers in the Salt Lake City, Utah area.

(5) The plaintiff may also call traffic managers from several large shippers throughout the United States to testify regarding the number of cars their respective companies diverted from the Denver and Rio Grande Western Railroad Company because of the threatened strike and resulting strike and for such period of time until the permanent injunction was issued.

(6) Mr. R. K. Bradford, Vice President in charge of traffic.

(7) Mr. Henry P. Crawford or Mr. Eugene S. Knutson.

(b) The defendants did not list any witnesses at the pretrial conference because their discovery procedure has not been completed.

(c) In the event there are other witnesses to be called at the trial a statement of their names and addresses and the general subject matter of their testimony will be served upon opposing counsel and filed with the Court at least 20 days prior to trial.

[fol. 58] 8. Exhibits:

A. Plaintiff's exhibits:

(1) The plaintiff filed the following exhibits:

Exhibit 1—Copy of letter from defendant signed by R. E. Carroll and R. H. McDonald, dated May 16, 1960, addressed to Mr. L. H. Hale, Vice President-General Manager of The Denver and Rio Grande Western Railroad Company.

Exhibit 2—Telegram from Mr. E. C. Thompson, Executive Secretary, National Mediation Board, dated April 15, 1960.

Exhibit 3—Mailgram from Ford Motor, Co. dated May 18, 1960.

Exhibit 4—Telegram from Ford Motor Co. dated June 1, 1960.

Exhibit 5—Trainman's News dated May 30, 1960.

(2) The defendants admit the authenticity, but not the materiality or relevance, of plaintiff's Exhibits 1, 2, 3, and 4.

B. Defendants' exhibits:

The defendants did not offer any exhibits at the pretrial conference for the reason that their procedure for discovery will not be completed until the plaintiff has answered the written interrogatories heretofore served upon it, and supplied to the defendants the names of the witnesses to be called by the plaintiff relative to its claim for damages. The defendants reserve the right to offer such exhibits as

they deem advisable based upon information obtained through discovery.

C. If other exhibits are to be offered and their necessity reasonably can be anticipated, they will be submitted to opposing counsel at least 20 days prior to the trial.

9. Discovery: The defendants have served interrogatories upon the plaintiff but to date of this conference have not been answered. Plaintiff is hereby granted an additional 30 days to answer said defendants' interrogatories. The plaintiff, within 30 days hereof, will notify defendants of the shipper witnesses they intend to call to prove the number of cars diverted from the plaintiff resulting from the strike notices and resulting strike and the loss suffered [fol. 59] thereby. The defendants shall complete their discovery within 45 days after being advised of the aforementioned shipper witnesses.

10. Modifications—Interpretations: Hereafter this order will control the course of the trial and may not be amended except by consent of the parties and the Court or by order of the Court to prevent manifest injusfices. The pleadings will be deemed merged herein. In the event of ambiguity in any provision of this order, reference may be made to the record of this conference to the extent reported by stenographic notes and to the pleadings.

11. Trial and estimated time: Trial of this case will be to the Court and the estimated time of trial is two days.

Done at Denver, Colorado, this 14th day of Feb. 1964.

By the Court:

William E. Doyle, United States District Judge.

Approved: Kenneth D. Barrow, Attorney for Plaintiff.

Philip Hornbein Jr., Attorney for defendants.

[fol. 68]

IN THE UNITED STATES DISTRICT COURT

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed January 12, 1965

I. Defendants' Proposed Findings of Fact

1. Plaintiff is a corporation organized under the laws of the State of Delaware with the principal place of business in Denver, Colorado. Plaintiff owns and operates a railroad system of about 2100 miles in inter and intrastate commerce and is a carrier within the meaning of and subject to the Railway Labor Act.

2. Defendant, Brotherhood of Railroad Trainmen, is a labor organization and the duly designated representative under the Railway Labor Act of a class of employees of the plaintiff. The general offices and headquarters of the Brotherhood are located in Cleveland, Ohio. The General Chairman of the General Grievance Committee of the Brotherhood on the property of the plaintiff maintains an office in the Kittredge Building, Denver, Colorado, to carry on the business of such Committee. This Committee is composed of representatives of local lodges the membership of which consists of employees of the plaintiff and of other railroads represented by the Brotherhood. At all times material herein a collective bargaining agreement has been in effect between the plaintiff and the defendant Brotherhood covering rates of pay, rules, and working conditions of plaintiff's employees represented by the Brotherhood.

3. On or about February 15, 1953, the Brotherhood submitted to the First Division of the National Railroad Adjustment Board, pursuant to Section 3, First (i) of the Railway Labor Act, claims on behalf of employees of the plaintiff represented by the Brotherhood based on the ground that the plaintiff had violated the collective bargaining agreement governing the employment of these em-

ployees in assigning work to trainmen beyond the scope of such agreement. On January 20, 1960, said Board issued Award No. 19389, sustaining these claims, and its accompanying order directing the plaintiff to comply therewith.

4. On or about March 3, 1953, the Brotherhood submitted to the First Division of the National Railroad Adjustment Board, pursuant to Section 3, First (i) of the Railway Labor Act, claims on behalf of employees of the plaintiff represented by the Brotherhood based on the ground that the plaintiff had violated the collective bargaining agreement governing the employment of these em-
[fol. 69] ployees in changing their assignments without prior negotiation and agreement with the union. On December 17, 1959, the Board issued its Award No. 19372, sustaining these claims, and its accompanying order directing the plaintiff to comply with the award.

5. Plaintiff refused to comply with Awards Nos. 19389 and 19372. A dispute then arose between the Brotherhood and the plaintiff with respect to such compliance. The Brotherhood threatened to call a strike on the property of the plaintiff on April 15, 1960, but such strike did not materialize because both the plaintiff and the Brotherhood accepted the mediation services of the National Mediation Board in the dispute. These services were terminated on or about May 13, 1960. Thereafter, on May 16, 1960, at approximately 2:00 p.m., employees of the plaintiff represented by the Brotherhood withdrew their services from the plaintiff because of the plaintiff's failure to comply with Adjustment Board Awards Nos. 19389 and 19372. This action was authorized by the President of the Brotherhood. The strike continued until the evening. This Court issued a temporary restraining order on that date, which was served upon the General Chairman of the Brotherhood General Grievance Committee at about 6:30 p.m., and he immediately began issuing instructions to local groups by telegram and telephone calling off the strike. The strike

ceased in the Denver area at about 8:30 p.m. and in the Salt Lake City area at about 10:00 p.m.

6. Subsequently, on or about June 2, 1960, in Civil Action No. 6796, this Court issued a preliminary injunction against the renewal or conduct of a new strike in such dispute. On July 27, 1960, this Court issued a permanent injunction. Denver & Rio Grande Western Railroad Company v. Brotherhood of Railroad Trainmen, 185 F. Supp. 369. This judgment was affirmed by the United States Court of Appeals for the Tenth Circuit. Denver & Rio Grande Western Railroad Company v. Brotherhood of Railroad Trainmen, 290 F.2d 266, cert. den. 366 U.S. 966.

7. The trial record does not sustain the allegations of the complaint with respect to B. E. Roark, A. J. Myers, J. W. Crocker, M. C. Brown, Carl F. Ahrens, N. E. Doolittle, and M. C. Feather. These defendants are not shown to have participated in any way in the calling or conduct of the strike nor is there any evidence with respect to their relationship, if any, with the Brotherhood.

[fol. 70] 8. All passenger and freight trains of the plaintiff scheduled to operate on May 16, 1960, did, in fact, operate although delayed. The plaintiff does not claim any damage or loss of business profits during the period of the strike on May 16, 1960.

9. The Ford Motor Company or companies supplying parts to the Ford Motor Company during the period May 19, 1960, to June 1, 1960, diverted approximately 200 carload shipments to other carriers, which would have been shipped at least in part over the lines of the plaintiff had it not been for the threat of a new or renewed strike by the Brotherhood in the event this Court should dissolve the restraining order and deny the plaintiff's request for an injunction. These shipments consisted of approximately 117 carloads of parts for cars shipped from plants owned by the Ford Motor Company or from suppliers of the company in the eastern part of the United States to points

west of Denver and of 83 carloads of assembled cars shipped from the Wixom, Michigan, plant of the Ford Motor Company to Salt Lake City.[1]

10. The total revenue which the plaintiff would have received had the shipments described in paragraph 9 above been transported over the lines of the plaintiff amounts to approximately $70,232.02. During the month of May 1960, the plaintiff's operating expenses were 68.42% of its freight revenue, leaving a net of 31.58%. Therefore, if the plaintiff had transported the shipments in question, it would have received a net profit from such transportation of $22,179.27. The trial record shows that the plaintiff paid only that portion of its employees during the period of the strike on May 16, 1960, who were called for duty and were not used. The record does not show the amount of such payments or the amount of wages saved by the carrier during the period of the strike on May 16, 1960.[2]

11. The Ford Motor Company did not consult with the Brotherhood with respect to its future intentions prior to the making of the company's decision to reroute shipments from the lines of the plaintiff Railroad.

[fol. 71] 12. The plaintiff did not promptly and properly inform the Ford Motor Company of the legal situation prevailing with respect to a strike threat after May 16, 1960. The plaintiff did not promptly inform the Ford Motor Company of its agreement with the Brotherhood made in this Court on May 26, 1960, that the restraining order could remain in effect until the Court had acted upon the plaintiff's request for injunctive relief. The record shows that the Ford Motor Company resumed shipments over the lines of the plaintiff when it was informed of the

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[1] This proposed finding is submitted only if the Court proceeds to a consideration of the amount of diversion and accepts the testimony of Mr. Henry Crawford with respect thereto.

[2] The same considerations apply to this proposed finding as in the case of paragraph 9 above.

agreement of May 26, 1960. However, there was a delay in such resumption by reason of the plaintiff's failure to promptly inform the Ford Motor Company of such situation.[3]

II. Defendants' Proposed Conclusions of Law

1. The complaint must be dismissed as to individual defendants B. E. Roark, A. J. Myers, J. W. Crocker, M. C. Brown, Carl F. Ahrens, N. E. Doolittle, and M. C. Feather, since the plaintiff has failed to sustain its burden of proof with respect to these defendants.

2. None of the defendants are liable in damages for any diversion of shipments from the lines of the plaintiff Railroad by shippers during the period May 19, 1960, through June 1, 1960, because of a future threatened strike by the Brotherhood over the plaintiff's failure to comply with Awards Nos. 19389 and 19372 of the National Railroad Adjustment Board since such strike would have taken place only if this Court had dissolved the restraining order against the defendant Brotherhood and denied plaintiff's request for injunctive relief. Such a strike would have been a lawful strike. Plaintiff is not entitled to damages for diversion of shipments based upon the threat of a lawful strike.

3. None of the defendants are liable in damages for any claimed loss of business profits resulting from the strike of May 16, 1960, because such strike in part was provoked by the carrier's refusal to accept the interpretation of the collective bargaining agreement between the Brotherhood and the plaintiff set forth in Award No. 19389. While the [fol. 72] plaintiff had a legal right under Section 3, First (m) of the Railway Labor Act to refuse to pay the money award involved in such decision, it did not have the legal

[3] The same considerations apply to this proposed finding as in the case of paragraph 9 above.

right to refuse to put into effect the contract interpretation involved,

4. In any event, the plaintiff has not proved with the certainty required by law the amount of loss of business profits from the diversion of shipments by shippers over the lines of the plaintiff during the period May 19, 1960, through June 1, 1960. The claimed loss of revenue from this source is uncertain. Moreover, the plaintiff has not sustained its burden of showing with reasonable certainty the amount of such loss because it has failed to show that it did not save from wages not paid to employees during the period of the strike on May 16, 1960, a sum greater than any claimed loss of business profits from diverted shipments.

5. Finally, the defendant Brotherhood and Mr. R. E. Carroll cannot be held liable for damages for any claimed loss of business profits growing out of diversion of shipments over the lines of the plaintiff for the period of May 19, 1960, through June 1, 1960, because the plaintiff did not promptly and properly inform the shippers of the legal situation which would assure a continuance of plaintiff's services. In addition, plaintiff did not promptly inform said shippers of the agreement reached on May 26, 1960, in the proceedings before this Court for a continuance of the restraining order until this Court acted upon plaintiff's request for relief, thus assuring the continuance of plaintiff's services until the issue of whether or not the Brotherhood could conduct a strike was litigated in this Court. Plaintiff has thus not discharged its duty of taking all reasonable steps to mitigate the damages claimed. Any diversion of shipments which took place was a direct result of this failure by the plaintiff.

Judgment is therefore granted to the defendants.

[fol. 73]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed February 8, 1965

This case having come on for trial before the Court, sitting without a jury pursuant to waiver of a jury trial by the parties, and the Court having considered the pleadings, the testimony adduced, and the briefs and arguments of counsel, enters the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. This is an action brought by plaintiff for damages growing out of a May 16, 1960, strike by defendants against plaintiff.

2. Plaintiff, The Denver and Rio Grande Western Railroad Company ("Rio Grande"), is a corporation organized under the laws of the State of Delaware and engages in interstate and intrastate common carrier operations by railroad. It owns and operates a railroad system extending from Denver, Colorado Springs and Pueblo, Colorado to Salt Lake City and Ogden, Utah, with numerous branches on those lines. Its principal operating office is in Denver, Colorado.

3. Defendant Brotherhood of Railroad Trainmen ("Brotherhood") is a labor organization and is the duly designated representative under the Railway Labor Act of a class of employees of plaintiff. Defendant carries on its business as representative in Denver, Colorado. At all times material herein, an agreement was in effect between the Rio Grande and the Brotherhood covering rates of pay, rules and working conditions of the Rio Grande's employees represented by the Brotherhood.

4. The Brotherhood has an office and carries on business in Denver, Colorado. The Brotherhood consists of a

Grand Lodge and several subordinate Local Lodges. Defendants B. E. Roark, A. J. Myers, J. W. Crocker, Carl F. Ahrens, N. E. Doolittle, M. C. Feather and R. E. Carroll are chairmen of Local Lodges of the Brotherhood in the State of Colorado, and defendant M. C. Brown is chairman of a Local Lodge of the Brotherhood in the State of Utah. Apart from defendant Brown, who resides within the State of Utah, each of said defendants resides within the State of Colorado. Each of said seven individual defendants as a Local Chairman acts for the Brotherhood in enforcing schedules, rules and working conditions and in matters of [fol. 74] grievance adjustments on the Rio Grande with respect to the members of the Local Lodge of which he is Local Chairman. Each of said seven individual defendants is in the employ of the Rio Grande and each fairly and adequately represents his organization and the members thereof employed by the Rio Grande.

5. Defendant R. E. Carroll resides in the State of Colorado and is a General Chairman of the General Grievance Committee, Denver & Rio Grande Western Railroad System, Brotherhood of Railroad Trainmen, and fairly and adequately represents the Brotherhood and the members thereof employed by the Rio Grande on its railroad sy[illegible]m.

6. Defendants collectively represent substantially all of the brakemen of the Rio Grande engaged in the operation of its trains. The employees of the Rio Grande represented by the defendants constitute a class, all of whom have an interest in this proceeding in the nature of a defendant's interest, but who are too numerous to be named individual defendants herein, and it is impracticable to make or name all of them as such. Defendants herein have a general and common interest involved in this suit with each other and with all members of the defendant Brotherhood employed by the Rio Grande, and can and do fairly and properly represent all of said employees herein as defendants in this action as a class suit.

7. On or about February 15, 1953, defendants submitted to the National Railroad Adjustment Board, First Division, pursuant to Section 3 First (i) of the Railway Labor Act, claims for additional pay for certain conductors and brakemen on account of herding work performed at Rio Grande's North Yard. On January 20, 1960, through Referee Sembower, the Adjustment Board rendered Award 19389 sustaining these claims. Immediately thereafter the Rio Grande ceased requiring conductors and brakemen to perform the herding work at its North Yard. However, considering Award 19389 to be erroneous, the Rio Grande refused to pay the money claims.

8. On or about March 3, 1953, defendants submitted to the National Railroad Adjustment Board, First Division, pursuant to Section 3 First (i) of the Railway Labor Act, claims for additional pay for certain brakemen on account of an allegedly improper turnaround freight run between Provo and Eureka, Utah. On December 17, 1959, through Referee Sembower, the Adjustment Board rendered Award 19372 sustaining these claims. A settlement was reached [fol. 75] between the parties concerning the turnaround practice in September 1960. However, because it considered Award 19372 to be erroneous, the Rio Grande refused to pay the money claims.

9. Because of the Rio Grande's failure to comply with the money claims in Awards 19389 and 19372, defendants were entitled to file an enforcement suit in the United States District Court under Section 3 First (p) of the Railway Labor Act. The enforcement procedure provided by Section 3 First (p) is the exclusive means of enforcing awards of the National Railroad Adjustment Board.

10. On April 12, 1960, defendants notified the National Mediation Board that their members would withdraw from service on the lines of the Rio Grande, beginning at 2:30 p.m. on April 15, 1960. The National Mediation Board thereupon proffered its mediation services. Defendants

postponed their threatened strike during mediation, which continued until May 13, 1960.

11. On May 16, 1960, at 1:30 p.m. defendants notified the Rio Grande that their members would withdraw from service, beginning at 2:00 P.M. on May 16. Thereupon, the employees represented by the Brotherhood went on strike to enforce payment of said two awards. The strike continued until eight hours later when it ceased pursuant to a temporary restraining award entered by this Court (Judge Chilson) at 4:20 P.M. on May 16, 1960. The strike was called by defendants for the purpose of enforcing said two awards of the Adjustment Board and the strike was authorized by the president of the Brotherhood and the individual defendants participated therein.

12. On June 2, 1960, a preliminary injunction was entered against the continuance of said strike, and on July 27 a permanent injunction was entered to the same effect. See Denver & Rio Grande Western R. Co. v. Brotherhood of Railroad Trainmen, 185 F. Supp. 369 (Dist. of Colo., 1960), affirmed, 290 F.2d 266 (C.A. 10, 1961), certiorari denied, 366 U.S. 966.

13. During the May 16, 1960 strike, the operation of plaintiff's passenger and freight trains was delayed. Thereafter, the Ford Motor Company and its suppliers diverted 274 carload shipments to other carriers, which would have been shipped over the lines of the Rio Grande except for said strike.

[fol. 76] 14. The total revenue which the Rio Grande would have received from the shipment of said 274 carloads amounts to $89,743.38, or a net profit to the Rio Grande of $37,988.37.

15. From May 16, 1960 through June 1960, the plaintiff regularly informed the Ford Motor Company of the developments in the litigation concerning said strike. The Rio Grande continuously endeavored to persuade the Ford

Motor Company not to divert any shipments and to restore shipments during said period.

16. The amount in controversy exceeds the sum of $10,000, exclusive of interest and costs.

Conclusions of Law

Under the foregoing Findings of Fact, the Court concludes that:

1. The cause of action here asserted by the Rio Grande is one arising under the laws of the United States regulating commerce and the Court has jurisdiction of the parties and subject matter of said cause under Sections 1331 and 1337 of the Judicial Code (28 USC §§ 1331 and 1337).

2. The complaint herein states a claim upon which relief should be granted.

3. By calling and engaging in this strike, defendants failed to exhaust the remedies provided by Section 3 First (p) of the Railway Labor Act and defendants violated their duties under that statute.

4. The illegal strike called by defendants forced a suspension of the Rio Grande's operations as a common carrier and caused traffic to be diverted by shippers from the lines of the Rio Grande, thereby resulting in loss of revenue. The Rio Grande was damaged by the calling and carrying out of defendants' unlawful strike in the amount of $37,988.37.

5. In addition to violating Section 3 First (p) of the Railway Labor Act, defendants entered into an illegal conspiracy to hinder and prevent the Rio Grande from carrying on its duties and lawful business as a common carrier, in that they wilfully and without excuse caused an illegal [fol. 77] strike or concerted work stoppage to occur on the Rio Grande.

6. The Rio Grande has established with reasonable certainty that it lost at least $37,988.37 net profit during the period from May 16, 1960 through July 27, 1960 (when this Court issued its permanent injunction) because of the diversion of shipments from the Rio Grande which took place as a direct result of defendants' illegal actions. Judgment is therefore granted to the plaintiff.

An appropriate judgment will be entered when presented by the plaintiff.

IN THE UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Entered March 8, 1965

This case having come on for trial before the Court, sitting without a jury pursuant to waiver of a jury trial by the parties, and the Court having considered the pleadings, the testimony adduced, and the briefs and arguments of counsel, enters the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Plaintiff is a corporation organized under the laws of the State of Delaware with its principal place of business in Denver, Colorado. It owns and operates an extensive railroad system in interstate and intrastate commerce, and is a "carrier" within the meaning of the Railway Labor Act.

2. Defendant, Brotherhood of Railroad Trainmen, is a labor organization and the duly designated representative under the Railway Labor Act of a class of employees of the plaintiff.

3. Defendant, R. E. Carroll, is the General Chairman of the General Grievance Committee of the Brotherhood on the property of the plaintiff. The other named defen-

dants are all local chairmen of local lodges of the defendant Brotherhood.

[fol. 78] 4. At all times material to this action a collective bargaining agreement was in effect between the plaintiff and the defendant Brotherhood covering rates of pay, rules and working conditions of plaintiff's employees represented by the Brotherhood.

5. On or about February 15, 1953, the Brotherhood submitted to the First Division of the National Railroad Adjustment Board, pursuant to Section 3, First (i) of the Railway Labor Act, claims on behalf of employees of the plaintiff represented by the Brotherhood. They were based on the ground that the plaintiff had violated the collective bargaining agreement in assigning work to trainmen beyond the scope of such agreement. On January 20, 1960, the Adjustment Board issued Award No. 19389, sustaining these claims, and its accompanying order directing the plaintiff to comply with the award.

6. On or about March 3, 1953, the Brotherhood submitted to the First Division of the National Railroad Adjustment Board, pursuant to Section 3, First (i) of the Railway Labor Act, claims on behalf of employees of the plaintiff represented by the Brotherhood. They were based on the ground that the plaintiff had violated the collective bargaining agreement in changing employee assignments without prior negotiation and agreement with the union. On December 17, 1959, the Board issued its Award No. 19372, sustaining these claims, and its accompanying order directing the plaintiff to comply with the award.

7. Plaintiff refused to comply with Awards Nos. 19389 and 19372. This created a dispute between the Brotherhood and the plaintiff. The Brotherhood threatened to call a strike on the property of the plaintiff on April 15, 1960, but it never materialized because both plaintiff and the Brotherhood accepted the mediation services of the Na-

tional Mediation Board. These services were terminated on or about May 13, 1960.

8. On May 16, 1960, at approximately 2:00 p.m., employees of the plaintiff represented by the Brotherhood withdrew their services from the plaintiff because of the plaintiff's failure to comply with the Adjustment Board Awards and went on strike to enforce payment of the awards.

9. This Court (Judge Chilson) issued a temporary restraining order on that date, which was served upon the General Chairman of the Brotherhood Grievance Committee at about 6:30 p.m. He immediately began contacting [fol. 79] local groups to call of the strike. The strike ceased in the Denver area at about 8:30 p.m. and in the Salt Lake City area at about 10:00 p.m.

10. Subsequently, officials of The Ford Motor Company met and determined that a strike threat still existed. A mailgram sent by Ford on May 18, 1960, to be effective on May 19, 1960, announced that traffic which would normally move over plaintiff's routings had been diverted to alternate routings.

11. Plaintiff gave assurances to the Ford Motor Company that it would be able to cope with the necessary freight movements. Ford weighed these assurances, along with its established practices in strike situations, its knowledge of the current legal situation and concluded that the diversion would be prudent.

12. On or about May 27, 1960, Ford was notified that plaintiff and the Brotherhood had agreed to a court decision in their dispute. Being satisfied that it was then safe to restore routings, Ford sent a telegram on June 1, 1960, which restored all prior diversions.

13. On or about June 2, 1960, this Court (Judge Chilson) issued a preliminary injunction against the renewal or conduct of any new strike in the dispute.

14. On July 27, 1960, this Court (Judge Chilson) issued a permanent injunction. See Denver and Rio Grande Western RR Co. v. Brotherhood of Railroad Trainmen, 185 F. Supp. 369 (Dist. of Colo. 1960), affirmed 290 F.2d 266 (10th Cir. 1961), cert. den. 366 U.S. 966 (1961), rehearing denied 368 U.S. 873 (1961).

15. All of plaintiff's passenger and freight trains scheduled to operate on May 16, 1960, did in fact operate, although delayed. Plaintiff does not claim any damage or loss of business profits during the period of the strike on May 16, 1960, therefore the only question before this Court is the amount of damages, if any, sustained by the plaintiff between May 19, 1960, and June 1, 1960.

16. During this period, Ford Motor Company or its suppliers, diverted approximately 274 carloads that would otherwise have been shipped over the plaintiff's rails, resulting in a revenue loss to the plaintiff of about $89,743.38.

[fol. 80] 17. For the year 1960, plaintiff's expenses ran about 57.67% of its revenue figures, therefore if the plaintiff had transported the shipments in question it would have received a net profit of $37,988.37.

18. There was no mention during the trial of defendants B. E. Roark, A. J. Myers, J. W. Crocker, M. C. Brown, Carl F. Ahrens, N. E. Doolittle, and M. C. Feather.

Conclusions of Law

1. This Court has jurisdiction of the parties and the subject matter in this action under 28 U.S.C. §§1331 and 1337.

2. By calling and engaging in the strike of May 16, 1960, defendants failed to exhaust the remedies provided by Section 3, First (p) of the Railway Labor Act.

3. The action must be dismissed as to B. E. Roark, A. J. Myers, J. W. Crocker, M. C. Brown, Carl F. Ahrens,

N. E. Doolittle and M. C. Feather, for failure to implicate these defendants in any way in the trial proceedings.

4. The union-authorized strike of May 16, 1960, was held to have been illegal by the decision of July 27, 1960, issuing the permanent injunction, but the threat of a renewed strike had persisted until June 2, 1960, when the preliminary injunction was issued by this Court (Judge Chilson).

5. The diversion of freight by the Ford Motor Company during the period of on or about May 19, 1960, to about June 1, 1960, was proximately caused by the existing threat of a strike and the failure to secure an injunction against such strike.

6. The diversion by the Ford Motor Company was a reasonable action based upon established practice and its knowledge of the legal situation surrounding the strike, specifically the knowledge that the restraining order of May 16, 1960, was issued ex parte and provided no assurance that an injunction would follow.

7. Plaintiff acted with due diligence and took all reasonable steps to mitigate its damages by keeping Ford informed as to the current legal situation regarding the strike.

[fol. 81] 8. Plaintiff has proven with sufficient certainty a loss of net business profits resulting from the diversion of shipments by Ford Motor Company during the period of May 19, 1960, through June 1, 1960, amounting to 42.33% of $89,743.38 or $37,988.37.

Judgment will be entered for the plaintiff and against the defendants Brotherhood of Railroad Trainmen and R. E. Carroll in accordance with these findings.

Plaintiff will promptly submit an appropriate form of Judgment.

Dated at Denver, Colorado this 8th day of March, 1965, A.D.

By The Court: Alfred A. Arraj, Chief Judge, United States District Court.

IN THE UNITED STATES DISTRICT COURT

ORDER OF JUDGMENT—Entered March 16, 1965

This case having come on for trial before the Court, sitting without a jury pursuant to waiver of a jury trial by the parties, and the Court having considered the pleadings, the testimony adduced, and the briefs and arguments of counsel; and

The Court having entered its findings of fact and conclusions of law herein on March 8, 1965,

It Is, Therefore, Adjudged And Ordered:

1. Judgment shall be entered in favor of the plaintiff, The Denver and Rio Grande Western Railroad Company, and against the defendants, Brotherhood of Railroad Trainmen and R. E. Carroll in the sum of Thirty-Seven Thousand Nine Hundred Eighty-Eight and 37/100 Dollars ($37,988.37) and costs to be hereinafter taxed on the filing of a Bill of Costs.

2. Judgment of dismissal shall be entered in favor of the defendants, B. E. Roark, A. J. Myers, J. W. Crocker, M. C. Brown, Carl F. Ahrens, N. E. Doolittle, and M. C. Feather.

[fol. 82] 3. Execution upon this judgment shall be stayed for a period of thirty days from this date.

Dated at Denver, Colorado, this 16th day of March 1965.

By The Court: Alfred A. Arraj, Chief Judge, United States District Court.

Approved as to form: Philip Hornbein, Jr., Attorney for Defendants.

IN THE UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed April 13, 1965

Notice is hereby given that the Brotherhood of Railroad Trainmen and R. E. Carroll, above-named defendants in this cause, hereby appeal to the United States Court of Appeals for the Tenth Circuit the final order and judgment of the Court, dated March 16, 1965, entering judgment in favor of the plaintiff, The Denver and Rio Grande Western Railroad Company, and against the appellants-defendants, Brotherhood of Railroad Trainmen and R. E. Carroll, in the sum of Thirty-Seven Thousand Nine Hundred Eighty-eight and 37/100 Dollars ($37,988.37) and costs to be thereafter taxed.

Dated at Denver, Colorado, on this 13th day of April, 1965.

Philip Hornbein, Jr., James L. Highsaw, Jr., Attorneys for the Appellants-Defendants.

IN THE UNITED STATES DISTRICT COURT

STATEMENT OF POINTS OF APELLANTS-DEFENDANTS —Filed April 13, 1965

Pursuant to the provisions of Rule 75(b) of the Rules of Civil Procedure, appellants-defendants file this, their statement of points on which they intend to rely on the appeal in this action.

[fol. 83] 1. The Court erred in failing to dismiss the complaint, as amended, on motion of the appellants-defendants on the ground that it failed to state a claim against the appellants-defendants upon which the relief prayed for could be granted.

2. The Court erred in failing to dismiss the complaint, as amended, on motion of the appellants-defendants as to appellant-defendant Brotherhood of Railroad Trainmen on

the ground that venue does not properly lie in this judicial district under Title 28, Section 1391 of the United States Code.

3. The Court erred in failing to dismiss the complaint, as amended, on motion of the appellants-defendants on the ground that the action is barred by the applicable provisions of the Colorado Statute of Limitations, Chapter 87, Article 1, Section 7 of the Colorado Revised Statutes.

4. The Court erred in failing to dismiss Count II of the complaint, as amended, on the ground that the Court does not have jurisdiction over the subject matter of such Count.

5. The Court erred in the conclusions in paragraph 4 of its Conclusions of Law holding that the threat of a renewed strike had persisted until June 2, 1960, when a preliminary injunction was issued by this Court in that such conclusions are contrary to the law and the evidence of record.

6. The Court erred in the conclusions in paragraph 5 of its Conclusions of Law in that such conclusions are based upon hearsay evidence and are contrary to the law and the evidence of record.

7. The Court erred in the conclusions in paragraph 6 of its Conclusions of Law in that such conclusions are based upon hearsay evidence and are contrary to the law and the evidence of record.

8. The Court erred in the conclusions in paragraph 7 of its Conclusions of Law in that such conclusions are contrary to the law and the evidence of record.

9. The Court erred in not including in its Conclusions of Law the proposed findings set forth in paragraph 2 of defendants' proposed conclusions of law, reading as follows:

> [fol. 84] "None of the defendants are liable in damages for any diversion of shipments from the lines of the plaintiff Railroad by shippers during the period May 19, 1960, through June 1, 1960, because of a future

threatened strike by the Brotherhood over the plaintiff's failure to comply with Awards Nos. 19389 and 19372 of the National Railroad Adjustment Board since such strike would have taken place only if this Court had dissolved the restraining order against the defendant Brotherhood and denied plaintiff's request for injunctive relief. Such a strike would have been a lawful strike. Plaintiff is not entitled to damages for diversion of shipments based upon the threat of a lawful strike."

Defendants' proposed conclusions are in accord with the applicable law and the evidence of record.

10. The Court erred in not including in its Conclusions of Law the findings set forth in paragraph 3 of defendants' proposed conclusions of law, reading as follows:

"None of the defendants are liable in damages for any claimed loss of business profits resulting from the strike of May 16, 1960, because such strike in part was provoked by the carrier's refusal to accept the interpretation of the collective bargaining agreement between the Brotherhood and the plaintiff set forth in Award No. 19389. While the plaintiff had a legal right under Section 3, First (m) of the Railway Labor Act to refuse to pay the money award involved in such decision, it did not have the legal right to refuse to put into effect the contract interpretation involved."

Defendant's proposed conclusions of law are in accord with the applicable law and the evidence of record.

11. The Court erred in not including in its Conclusions of Law the findings set forth in paragraph 4 of defendants' proposed conclusions of law, reading as follows:

"In any event, the plaintiff has not proved with the certainty required by law the amount of loss of business profits from the diversion of shipments by shippers

over the lines of the plaintiff during the period May 19, 1960, through June 1, 1960. The claimed loss of revenue from this source is uncertain. Moreover, the plaintiff has not sustained its burden of showing with reasonable certainty the amount of such loss because it has [fol. 85] failed to show that it did not save from wages not paid to employees during the period of the strike on May 16, 1960, a sum greater than any claimed loss of business profits from diverted shipments."

Defendants' proposed conclusions are in accord with the applicable law and the evidence of record.

12. The Court erred in not including in its Conclusions of Law the findings set forth in paragraph 5 of defendants' proposed conclusions of law, reading as follows:

"Finally, the defendant Brotherhood and Mr. R. E. Carroll cannot be held liable for damages for any claimed loss of business profits growing out of diversion of shipments over the lines of the plaintiff for the period of May 19, 1960, through June 1, 1960, because the plaintiff did not promptly and properly inform the shippers of the legal situation which would assure a continuance of plaintiff's services. In addition, plaintiff did not promptly inform said shippers of the agreement reached on May 26, 1960, in the proceedings before this Court for a continuance of the restraining order until this Court acted upon plaintiff's request for relief, thus assuring the continuance of plaintiff's services until the issue of whether or not the Brotherhood could conduct a strike was litigated in this Court. Plaintiff has thus not discharged its duty of taking all reasonable steps to mitigate the damages claimed. Any diversion of shipments which took place as a direct result of this failure by the plaintiff."

Defendants' proposed conclusions are in accord with the applicable law and the evidence of record.

13. The court erred in the findings in paragraph 8 of its Findings of Fact to the effect that all employees of the plaintiff represented by the Brotherhood withdrew their services from the plaintiff on May 16, 1960, in that the evidence of record shows that only some of such employees withdrew their services.

14. The Court erred in the findings in paragraph 10 of its Findings of Fact in that such findings are based upon hearsay evidence improperly admitted into the record and are contrary to law and the evidence of record.

[fol. 86] 15. The Court erred in the findings in the second sentence of paragraph 11 of its Findings of Fact in that such findings are based on hearsay evidence improperly of record and contrary to law and the evidence of record.

16. The Court erred in the findings in the second sentence of paragraph 12 of its Findings of Fact in that such findings are based on hearsay evidence improperly of record and contrary to law and the evidence of record.

17. The Court erred in the findings in paragraph 16 of its Findings of Fact in that such findings are based upon hearsay evidence improperly of record and are contrary to the law and the evidence of record.

18. The Court erred in the findings in paragraph 16 of its Findings of Fact for the additional reason that it included therein 62 carloads of outbound shipments from the Milpetas, California, plant of Ford Motor Company, which the evidence of record shows were immediately balanced off by the shipment over the lines of the plaintiff railroad from that plant of 62 cars of shipments which would have otherwise been routed over the Southern Pacific lines. There was thus, as a matter of law, no injury at all to the plaintiff with respect to such shipments.

19. The Court erred in the findings in paragraph 17 of its Findings of Fact in using plaintiff's expense figures for the entire year 1960 instead of figures for the month of May 1960 when the subject matter of the complaint and the shipments involved took place.

20. The Court erred as a matter of law in not including in its Findings of fact the facts shown by the evidence of record that the plaintiff paid only that portion of its employees during the period of the strike on May 16, 1960, who were called for duty and were not used.

21. The Court erred in not including in its Findings of Fact the facts shown by the evidence of record that the Ford Motor Company did not consult with the Brotherhood with respect to the Brotherhood's future intentions for the period May 16, 1960, through June 1, 1960.

[fol. 87] 22. The Court erred in failing to include in its Findings of Fact the fact that the plaintiff did not promptly and properly inform the Ford Motor Company of the legal situation prevailing with respect to a strike threat after May 16, 1960, and that the plaintiff did not promptly inform the Ford Motor Company of its agreement made in open Court with the Brotherhood on May 26, 1960, that the restraining order could remain in effect until the Court had acted upon the plaintiff's request for injunctive relief.

23. The Court erred as a matter of law in its conclusion that judgment should be entered for the plaintiff and against defendants Brotherhood of Railroad Trainmen and R. E. Carroll in accordance with the Court's findings of March 8, 1965.

24. The Court erred as a matter of law in not entering judgment for the defendants Brotherhood of Railroad Trainmen and R. E. Carroll and against the plaintiff.

Respectfully submitted,

Philip Hornbein, Jr., James L. Highsaw, Jr., Attorneys for the Appellants-Defendants.

[A supersedeas bond was filed April 14, 1965.]

IN THE UNITED STATES DISTRICT COURT

Official Transcript

Proceedings before the Honorable Alfred A. Arraj, Chief Judge, United States District Court for the District of Colorado, beginning at 9:00 o'clock a.m., on the 3rd day of December, 1964, in Courtroom A, Main Post Office Building, Denver, Colorado.

APPEARANCES: Walter J. Cummings, Jr., Kenneth D. Barrows, T. A. White, appearing for the Plaintiff; James L. Highsaw, Philip Hornbein, Jr., appearing for the Defendants.

[fol. 88] The Court: Case 7800, Denver and Rio Grande Western Railroad versus Brotherhood of Railroad Trainmen. Mr. Barrows and Mr. Cummings for the plaintiff; Mr. Highsaw and Mr. Hornbein for the defendants. Are you ready, gentlemen?

Mr. Cummings: Yes, Your Honor.

Mr. Highsaw: Yes, Your Honor.

The Court: All right, you may proceed.

Mr. Cummings: If the Court please, you will recall that this is a class action against the Brotherhood of Railroad Trainmen and its members for damages suffered by the D&RG Western during a strike and other proceedings that were held to be illegal that occurred on May 16, 1960 and lasted approximately the evidence will show nine hours.

The first notice of the strike came in April of that year. The actual strike took place on May 16th, as I said, and the pretrial order admits the strike was authorized by the President of the Railroad Trainmen.

At the pretrial conference before Judge Doyle, the defendants admitted that Judge Orie Phillips had passed on the various defenses asserted by the defendants so that they will not be argued again today to Your Honor, except, of course, they are preserved in case of any appeal, so that the only matter before Your Honor today is the

amount of damages incurred by the Denver and Rio Grande.

Before calling any witnesses, Your Honor, we would like to check this morning to see whether the court reporter attached to Mr. Crawford's deposition, which is under seal, the four exhibits that were tendered at that deposition. If not, I am going to have copies of those exhibits marked.

The Court: No exhibits are apparently attached to this.

Mr. Cummings: Very well, Your Honor, I will ask the Clerk to mark them.

(Plaintiff's Exhibits 4, 5, 6 and 7 were marked for identification.)

[fol. 89] The Court: What numbers are you putting on there?

The Clerk: 4, 5, 6 and 7.

Mr. Cummings: 1 and 2 are already filed.

The Court: Yes, I have those.

Mr. Cummings: And Exhibit 3 we have just had marked this morning and it has not been introduced yet. It is a compilation.

The Court: All right.

(Plaintiff's Exhibits 8, 9 and 10 were marked for identification.)

Mr. Cummings: Would Mr. Carroll take the stand, please?

Mr. Highsaw: Mr. Carroll is not here yet.

Mr. Cummings: You said he would be.

Mr. Highsaw: Yes, I promised to have him available today. I am not sure why he isn't here at this particular moment, but I assure you he will be here before the day is over.

(Counsel conferred.)

Mr. Highsaw: Mr. Cummings, we just sent somebody to call Mr. Carroll to make sure there wasn't any misunderstanding.

Mr. Cummings: All right, I will call Mr. Crawford then.

The Court: Does the defendant agree that the only matter at issue at this time is what damages if any the plaintiff is entitled to?

Mr. Highsaw: Yes, we concede, Your Honor, that the only evidence here that has to be presented at this time is bearing on the question of damages.

With respect to counsel's statement that Judge Phillips passed on all our defenses, I would like to qualify that by saying what he passed on was what we put in our mo-[fol. 90] tion to dismiss and we are not waiving those defenses, of course. We just assume Your Honor doesn't want them to be relitigated this morning.

The Court: Yes, they would be the law of the case as far as the Court is concerned.

Mr. Highsaw: And we are proceeding from there and the only thing to be tried factually is the damages.

The Court: Well, do you gentlemen wish to make opening statements?

Mr. Cummings: I have made all I want to. Perhaps Mr. Highsaw wants to.

The Court: Just be seated, Mr. Crawford, and give Mr. Highsaw an opportunity to make his opening statement.

Mr. Highsaw: Your Honor, I have a very brief trial memorandum, which doesn't go into the evidence, of course. It is on our legal position with respect to the damages, which I would like to present to the Court.

The Court: All right.

Mr. Highsaw: I would like to note that Mr. Carroll is in the courtroom now, Your Honor. It is our position that the plaintiff suffered no actual monetary loss as a direct and proximate result of the strike. The losses that they suffered were uncertain and speculative, that at least to some extent the record shows the claimed losses were subsequently made up by shippers and that the claimed sses do not take into account savings incurred by the carrier in the form of wages not paid during the strike itself on May 16, 1960.

The plaintiff's claim of losses as shown by the answers to the interrogatories which the defendant submitted is

based solely on the claim of loss of revenue from freight shipments which the plaintiff alleges were diverted from the Denver and Rio Grande Railroad at periods of time after the strike was over, beginning several days after the strike was over, running from approximately May 19th through about June 1st of 1960.

[fol. 91] It is the position of the defendant, Your Honor, that even if the plaintiff should establish these diversions that the defendants are not legally liable for the claims with respect thereto; that in the absence of evidence that the defendants directly instigated and caused such diversions, it is our position that the diversions were caused by reason of the anticipation of shippers that there might be a strike occur after May 16, 1960, if this Court should dissolve the restraining order which was then in effect and should not grant a permanent injunction against the strike.

They were therefore relying on a threat which was a legal threat because if there was a threat of a strike after May 16, 1960 it was a threat that was premised on the condition that it would be a legal strike because it could not take place unless the court found the defendants had a right to strike and dissolved the restraining order which was then in effect, and it is our position that the losses which are claimed are not the direct and proximate result of the strike itself.

We also have the legal position that while loss of business profits may be recovered in this Circuit arising out of interruptions to business that they must be clearly proved and be reasonably certain and not merely conjectural.

And, our legal position with respect to the damages, Your Honor, is that at the time the strike in question occurred, there had been some thirty years of operation under the Railway Labor Act. No court up to that had held that it was improper or unlawful for a railway labor organization to conduct a strike for the purpose of enforcing Adjustment Board Awards and that the defendants'

action of May 16, 1960 was in complete good faith, was under color of legitimate purpose and in circumstances where the railroad was at least partially in error and blame.

This is shown by the fact that this Court and the Court of Appeals sustained the validity of the Adjustment Board decision in Case 7348 with respect to the interpretation of the contract which the carrier had refused to recognize and which had been one of the reasons for the invocation of the strike on May 16, 1960.

Basically, that's our position, Your Honor.

[fol. 92] The Court: All right. Mr. Carroll is here now, Mr. Highsaw announced.

Mr. Cummings: Before calling Mr. Carroll, I would just like to comment that some of the matters Mr. Highsaw was arguing to the Court we believe have been passed upon by Judge Phillips and as far as the fact that the plaintiff might have been compensated by shippers by restoring business previously lost, this, of course, is a tort case, and under the Grayson case of the Tenth Circuit, which I will mention later on, it is immaterial whether or not a plaintiff is made whole or compensated by a third party. It would be different if it were a contract case.

Mr. Carroll, would you take the stand, please?

RICHARD E. CARROLL called as a witness by the plaintiff, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Cummings:

Q. Mr. Carroll, would you please state your name and address and position?

A. Richard E. Carroll, 720 Kittridge Building, Denver, General Chairman of the General Grievance Committee, Brotherhood of Railroad Trainmen on the D&RGW.

Q. Did you occupy that position back in May of 1960, when the strike involved in this case took place?

A. I did.

Q. Did you also occupy that position in April of 1960 when the strike was first threatened?

A. Yes.

Q. Are you familiar with the fact that the National Mediation Board intervened in this matter in May of 1960?

A. Yes.

Q. What caused them to intervene, Mr. Carroll?

A. If I recall correctly, the carrier invoked mediation.

Q. What caused the carrier to invoke mediation? Was there a strike threat?

A. Yes, we had pre-set a strike.

Q. And you advised the National Mediation Board?

A. Yes.

Q. And they in turn advised the carrier? Isn't that true, on or about May, 1960?

A. I think that's true.

Q. Was the mediation successful?

A. No, it was not.

Q. And after the mediation terminated, what took place?

A. We set another strike then.

[fol. 93] Q. Was that to be effective May 16, 1960?

A. That's right.

Q. And was that authorized by the President of the Brotherhood of Railroad Trainmen?

A. It was.

Q. What time on May 16, 1960 did the strike commence?

A. As I recall, it was set for 2:00 p.m.

Q. That is when it started, is it not?

A. Yes.

Q. And how long did it last in the Denver area to the best of your knowledge?

A. Well, that's rather hard to say. As I recall it, we began to issue instructions calling off the strike about 6:30 to 7:00 p.m., and, of course, it takes time to get those notices out to these different people and get in contact with

them, but we did that just as quickly as we possibly could through telephoning and sending the telegrams.

Q. To refresh your memory, was the restraining order issued on or about 7:00 p.m. on that date?

A. Yes, I believe it was.

Q. So it would have taken sometime for the strike to stop thereafter, would it not?

A. That's right.

Q. Would it be fair to say, as the railroad did in its answers to your interrogatories, that the strike in Denver did not cease until about 8:30 p.m. that evening?

A. I believe that would be about correct.

Q. At Salt Lake, could you tell us how long the strike lasted?

A. I can't say definitely. I believe it was a little later though there than it was in Denver due to the fact we had to get telegrams to these people and our representatives in that area and also the difficulty in contacting them long distance.

Q. Would it refresh your memory, Mr. Carroll, if I show you Plaintiff's Exhibit 8 for identification, which is the "Trainmen's News" of May 30, 1960, and ask you to read the righthand column?

Mr. Highsaw: Just a moment. (Counsel examining exhibit.)

By Mr. Cummings:

Q. I would like you to read aloud, please, the fourth paragraph.

The Court: Just a moment, Mr. Cummings. It is our practice or at least my practice, that exhibits not be read into the record unless they are received in evidence.

Mr. Cummings: Very well, I would like to move that this exhibit be received in evidence, Your Honor.

[fol. 94] Mr. Highsaw: Your Honor, I am going to object. I have no objection to that particular paragraph being read into the evidence but—

Mr. Cummings: Well, that would satisfy us.

The Court: All right.

Mr. Highsaw: This document hasn't been served on us in connection with this case.

The Court: All right, then we will proceed on that basis, that it may be read.

Mr. Highsaw: I understand he wanted one small paragraph.

Mr. Cummings: That's correct.

A. "A restraining order was handed down by the U.S. District Court, Denver, at 7:00 p.m., and the B. of R.T. immediately issued instructions to have the picket lines withdrawn from the various terminals. This was accomplished by 10:00 p.m."

Q. So would you say the strike lasted at least until 10:00 p.m. in the Salt Lake area?

A. I would imagine about that time.

Cross examination.

By Mr. Highsaw:

Q. Mr. Carroll, you mentioned when the restraining order was received, you sent out notices immediately. What form did these take, letters, telegrams or telephone calls?

A. Telegrams and long distance telephone calls. Local calls in Denver.

Q. Did you proceed immediately upon receipt of the restraining order to do this?

A. Yes, sir.

Q. Did you at any time thereafter send out any strike notice or request a strike in connection with this matter?

A. After that time?

Q. After that.

A. No, sir.

Mr. Highsaw: That's all.

The Court: You may step down, Mr. Carroll.

[fol. 95] Mr. Cummings: Mr. Crawford, please.

HENRY P. CRAWFORD called as a witness by the Plaintiff, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Cummings:

Q. Would you give your name and address?

A. Henry P. Crawford, The American Road, Dearborn, Michigan, Ford Motor Company.

Q. What is your position at the Ford Motor Company?

A. I am Manager of Traffic Analysis Reporting to the Director of Traffic and the Vice President of Purchasing.

Q. Did you occupy that position in May of 1960?

A. I did.

Q. Did you previously give a deposition at the request of the Brotherhood of Railroad Trainmen on March 6, 1964?

A. I did.

Q. Showing you a Mailgram, which was made Exhibit 1 by Mr. Highsaw at your deposition, and which your—

Mr. Highsaw: Your Honor, I object to any references to the deposition. I didn't mind establishing on the record the deposition was taken, but the witness is here and he is testifying and unless they want to use the deposition to impeach him, I don't believe it is proper for counsel to make reference to the deposition.

The Court: All right, have it marked here.

Mr. Cummings: It has been.

The Court: All right, I will sustain the objection to the reference to the deposition at this point. If it becomes necessary to refresh his memory or impeach, then it may be used, reference to the deposition may be used.

By Mr. Cummings:

Q. Showing you Plaintiffs' Exhibit 4 for identification which purports to be a Mailgram from J. J. Ward to Messrs. Morcom, Knutson, Stevens and Rea, are you familiar with that document? Have you seen it before?

A. I have.

Mr. Cummings: I would like to offer that in evidence, Mr. Highsaw.

[fol. 96] Mr. Highsaw: I object on the grounds, Your Honor, that the document shows on its face it was sent by Mr. J. J. Ward and not by this witness and it is hearsay evidence.

The Court: Well, the objection is sustained at this time. The only identification has been that he has seen it. Possibly he knows more about it than that. I don't know.

By Mr. Cummings:

Q. Are you familiar with the Mailgram?

A. I am.

Q. As part of your duties which you described to the Court, were you familiar with that Mailgram at that time?

A. I was, sir.

Mr. Cummings: On that basis we think it is admissible and as I said it was marked as an exhibit at Mr. Crawford's deposition by Mr. Highsaw and used in interrogating him in the deposition.

Mr. Highsaw: Your Honor, in the first place, the deposition was purely for purposes of discovery and the fact that it was involved in the deposition does not make it valid for evidence at this time.

Secondly, there has been no proper foundation laid that this witness knows of his own personal knowledge that this document was actually sent and it still has not been established that his knowledge about that Mailgram is anything other than knowledge that he has gained from other people and consequently it is hearsay.

By Mr. Cummings:

Q. In the course of your business at the Ford Motor Company, did you learn that this Mailgram was sent?

A. Yes, I did.

Mr. Cummings: We think that a sufficient foundation has been laid, Your Honor.

The Court: Well, I assume that Mr. Highsaw's objection continues. Does it, Mr. Highsaw?

Mr. Highsaw: That's correct, Your Honor.

The Court: I must sustain it on the showing that has been made so far that there has not been a proper foundation to accept the exhibit in evidence.

[fol. 97] By Mr. Cummings:

Q. Mr. Crawford, on or about May 18, 1964, did the Ford Motor Company send a Mailgram to various members of its Traffic Department?

Mr. Highsaw: I object to that.

Mr. Cummings: I am asking for his personal knowledge.

Mr. Highsaw: Well, he is asking whether the Ford Motor Company—the Ford Motor Company consists of a great many people. If he wants to ask him whether he personally sent a Mailgram, I have no objection, but he can't ask him a question whether the Ford Motor Company did.

Mr. Cummings: Well, he was a member of the Traffic Control Department. I will restrict the question to that.

By Mr. Cummings:

Q. Did the Traffic Control Department to your knowledge send a Mailgram on or about May 18, 1960?

Mr. Highsaw: I will still object to that in that the Traffic Control Department obviously consists of a number of people. It is still not limited to personal activities and any knowledge of this witness other than what he gained by hearsay.

The Court: Do you represent, Mr. Cummings, that this witness has the care, custody and control of the record that you have had marked as Exhibit 4?

Mr. Cummings: We will ask him.

By Mr. Cummings:

Q. Do you have custody of such records, Mr. Crawford?

A. In the normal course of our record keeping one of my assignments is such record keeping. Specifically, I received a copy of this telegram at the time it was originated.

The Court: I suggest you find out if this particular document was sent.

Mr. Cummings: I wasn't going to go any further on that. I thought you overruled it. Would you read the last question that was objected to by Mr. Highsaw to the witness? [fol. 98] The Reporter: "Did the Traffic Control Department to your knowledge send a Mailgram on or about May 18, 1960?"

By Mr. Cummings:

Q. Was such a Mailgram sent on or about May 18, 1960, to Messrs. Morcom, Knutson, Stevens and Rea to your personal knowledge?

A. Yes, sir, to my personal knowledge, and I received the copy that was addressed to Mr. Knutson.

Q. Did that Mailgram concern the threatened strike on the Denver and Rio Grande?

Mr. Highsaw: I object on the ground the best evidence would be the Mailgram itself, and it has not been admitted in evidence.

By Mr. Cummings:

Q. What knowledge did you acquire personally of this strike, Mr. Crawford, on or about May 18, 1960?

Mr. Highsaw: I object without a foundation being laid as to how he acquired the knowledge and where.

The Court: Your objection on the grounds stated is overruled, but I think counsel is asking leading questions. I thing the proper approach would be to ask him if on or about the date you are concerned about he had any knowledge of any strike and tell what knowledge he has.

Mr. Cummings: Very well, I will be glad to abide by that advice, Your Honor.

By Mr. Cummings:

Q. On or about May 18, 1960, did you have any knowledge of a strike on the Denver and Rio Grande?

A. I had such knowledge. The knowledge consisted of a collection of telephone conversations with the persons in Ford Company involved with such strikes and as well as the representatives of the Rio Grande in the Detroit offices, and in general a careful watching of the areas, trade journals, newspapers and so on that bring these subjects to bear normally.

Q. What if anything did you or your department do about the strike?

Mr. Highsaw: I object to the part of it that deals with his department.

By Mr. Cummings:

Q. Well, to your personal knowledge, what was done by your department with respect to the strike?

[fol. 99] The Court: He may answer this question.

A. The Traffic Office issued instructions to a Mr. J. J. Ward to in turn list the principal origin or shipping plants of the companies as well as certain key suppliers to divert such traffic that would normally move over the Rio Grande routings to alternate routings. Mr. J. J. Ward then under our direction invented or developed alternate routings off the Rio Grande and issued the wire that is in question here.

Mr. Highsaw: I move that answer be stricken on the grounds it is hearsay.

The Court: The motion will be denied.

By Mr. Cummings:

Q. When if at all were any routing instructions given by your department that would remove the Rio Grande from Ford business?

A. I will refresh my memory.

Mr. Highsaw: Your Honor, so as to simplify things, may I have a continuing objection to all questions which are directed to what the witness' department did as distinguished from what the witness himself did?

Mr. Cummings: May I ask the witness to testify only of his own personal knowledge?

The Court: Yes, the objection may be continuing, but you will please follow the suggestion that counsel has made that you just testify to matters within your own personal knowledge, Mr. Crawford, please.

A. (Continued) My copy of this telegram is dated May 18, 1960.

Q. And as a result of that telegram did Ford divert any business from the Rio Grande?

A. We did.

Q. For approximately what period?

A. The same Mr. J. J. Ward, with a copy to me, issued a countermanding telegram dated June 1, 1960, restoring the normal routings of the Rio Grande.

Q. Showing you Plaintiff's Exhibit 6 for identification, is that the telegram you have just referred to?

A. Yes, sir, it is.

Mr. Cummings: I would ask that it be received in evidence.

[fol. 100] Mr. Highsaw: My objection as to Exhibit 6 is the same as I stated my objection to Plaintiff's Exhibit 4, Your Honor. Again, it is a document signed by Mr. J. J. Ward, wasn't issued by this witness, this witness' knowledge was acquired from other people, and it is hearsay.

By Mr. Cummings:

Q. Did you personally receive a copy of that telegram?

A. I did, sir.

The Court: Well, who directed the issuance of it, if you know?

The Witness: We act in substance as a committee, with the Director of Traffic, myself and Mr. Ward's immediate superior acting as a body of three, and such routings and changes are issued, so I could say jointly this decision was arrived at.

The Court: Did you participate in the making of the decision?

The Witness: I did.

The Court: Does the letter represent the decision of the committee you referred to?

The Witness: Yes, sir.

The Court: The exhibit will be received.

(Plaintiff's Exhibit 6 for identification was received in evidence.)

By Mr. Cummings:

Q. Is that true also of Plaintiff's Exhibit 4 of May 18, 1960? Is that a committee decision in which you participated?

A. Yes, sir, identical circumstances.

Mr. Cummings: For the same reason, Your Honor, we think it should be received, at this point.

The Court: Which one is that?

Mr. Cummings: That is the Mailgram.

[fol. 101] The Court: All right, I think the foundation has now been properly laid for the reception of the Mailgram. I don't recall the number.

Mr. Cummings: That is Plaintiff's Exhibit 4.

The Court: 4 will be received and 6 will be received.

(Plaintiff's Exhibit 4 for identification was received in evidence.)

By Mr. Cummings:

Q. After this strike occurred, at any time did you cause to be prepared a list of cars that Ford diverted from the

Denver and Rio Grande Railroad because of the threatened strike in May and June of 1960?

A. We did prepare such a listing.

Q. Showing you a copy of Plaintiff's Exhibit 5 for identification, I will ask you if that isn't such a list?

A. That is the list.

Q. That was prepared under your direction and control, is that true, Mr. Crawford?

A. Yes, sir.

Q. And it was based on documents in Ford's possession?

A. Yes, sir.

Mr. Cummings: I will move the receipt of this document in evidence.

Mr. Highsaw: Which exhibit is this, now?

Mr. Cummings: Exhibit 2 at his deposition. It is Exhibit 5 here.

Mr. Highsaw: Your Honor, I object to the receipt of this document in evidence. It purports to show the diversions, purports to show what happened to shipments which left the Ford plant in Philadelphia, a Ford plant in Chicago Heights, the Eaton Manufacturing Company in Cleveland, a Ford plant in Monroe, the Warner Gear of Muncie, Indiana Corporation, the Ford plant at Sterling and Ford plant in Rouge.

Now, unless foundation is laid that this witness personally directed these alleged diversions and had personal knowledge that they occurred at the time and not based upon some document that he says generally was in the possession of the Ford Motor Company, I would object to its receipt in evidence.

[fol. 102] By Mr. Cummings:

Q. Mr. Crawford, was this document in question prepared in the course of your business from records in Ford's control?

A. They were.

Mr. Cummings: Well, Your Honor, we think that sufficient foundation has been laid.

Mr. Highsaw: The witness still hasn't shown who prepared this document.

Mr. Cummings: I asked whether it was prepared under his direction and control and he answered yes.

Mr. Highsaw: Well, that still doesn't show who prepared the original documents. Obviously the original documents had to come from Philadelphia, Chicago Heights, Cleveland, Monroe, Sterling and Rouge, and it doesn't show who prepared those and how or on what basis, whether the managers of those plants gave the information or whether it was some shipping clerk or what.

The Court: Well, it might be helpful to the Court in ruling on this matter if you will have the witness outline the procedure that is followed by his department in determining where shipments or how they will be routed from Rouge or Sterling or from these other plants.

Mr. Cummings: Yes, surely.

By Mr. Cummings:

Q. Would you do that?

A. Yes, sir, as a regular course of our management of rail routing and shipments, when instructions of the types we have seen here are issued to various shippers we then follow up to see that such instructions are carried out. We do this in two ways. The first is a review of a so-called shipping deviation form, which is a standard form of the company which all shipping locations are asked to execute whenever they route a rail car over a so-called abnormal routing. It might be abnormal for any number of reasons. In this case it would be construed as abnormal because it was a specific instruction. The second check we have, and this would apply to this particular exhibit, is an actual gathering of freight bills that were paid showing the railway routing. This ties the instructions, the shipping report form and the actual

payment of charges together into one common point, specifically my office, and people under my supervision from those sets of documents prepared this summary.

[fol. 103] The Court: I believe a foundation has been laid. The exhibit will be received.

(Plaintiff's Exhibit 5 for identification was received in evidence.)

Mr. Highsaw: May I make a statement for the record?

The Court: Do you care to examine the witness on voir dire?

Mr. Highsaw: No, I just want to make a statement.

The Court: All right.

Mr. Highsaw: It is our position, Your Honor, that the best evidence on what the witness is testifying about is the deviation form he is talking about, the bills of lading themselves, the forms which they used. This is merely a conclusionary document based on those and the actual foundation evidence is not before the Court, and on that basis we would have a continuing objection.

The Court: I think it could be treated as a summary.

Mr. Cummings: That's what it was meant to be, a compilation.

The Court: Yes.

By Mr. Cummings:

Q. Mr. Crawford, as the result of your study in the course of your business, did you personally learn how many cars had been diverted by the Ford Motor Company from the Denver and Rio Grande during the period in May and June of 1960 that's in question here?

A. Yes, sir, by the counting of the two sets of source documents we arrived at a total number of carloads.

Q. How many was that, if you recall?

A. Our count from this summary indicated that there were 118 carloads of automotive parts and a subsequent study 94 carloads of assembled vehicles, totaling 212 carloads in all.

Mr. Highsaw: Your Honor, so I won't be continuously objecting, may I have a continuing objection to any testimony of any kind based on these underlying documents which are not before the Court?

[fol. 104] The Court: Yes, the record may so reveal.

By Mr. Cummings:

Q. Showing you Plaintiff's Exhibit 7 for identification—Mr. Highsaw, this was Exhibit 4 at the deposition, it is Plaintiff's Exhibit 7 for identification here—I will ask you if that document was prepared in a similar fashion to the documents that we have just been discussing, namely Plaintiff's Exhibit 5?

A. Slightly different. We do not perform this report of shipping deviation on assembled vehicles, which this document is concerned with. We instead took the freight bills, as I mentioned as the second method used in the other exhibit, so the freight bill summary was all that was used in this exhibit. It was the actual documents from which the bills were paid.

Q. That is a compilation of the freight bills then in your possession?

A. Yes.

Mr. Cummings: For the reasons given with respect to the previous exhibit, we offer Plaintiff's Exhibit 7, Your Honor.

Mr. Highsaw: Your Honor, I would like to object to the exhibit on the grounds I have previously stated. Before you rule on it, I would like to have permission to voir dire the witness at this point.

The Court: All right, you may.

Voir dire examination.

By Mr. Highsaw:

Q. Mr. Crawford, these freight bills which you are talking about in your possession, are they in your personal possession or are they simply in the office?

A. My personal possession. I personally touched every single one of them.

Q. Have you looked at every one of the freight bills that represent the numbers in this Plaintiff's Exhibit 7?

A. In touching them, I certainly looked at them.

Q. You read every one of them?

A. Yes, sir.

Mr. Highsaw: That's all, Your Honor.

The Court: I do not believe you have established with reference to this exhibit, Mr. Cummings, whether or not it was prepared under his direction.

[fol. 105] Mr. Cummings: Well, I did ask the general question whether it was prepared in the same way as Plaintiff's Exhibit 5, but I will ask the specific question.

Direct examination (continued).

By Mr. Cummings:

Q. Mr. Crawford, was it prepared under your direction?

A. One of my employees prepared this exhibit from the freight bills.

Q. Did you personally verify its accuracy?

A. To the extent of my human ability, yes, sir, I did.

The Court: The exhibit will be received.

(Plaintiff's Exhibit 7 for identification was received in evidence.)

By Mr. Cummings:

Q. And does that exhibit cover the additional 94 cars that you testified to that were diverted from the Rio Grande during this period?

A. This covers carloads from the Wixom assembly plant near Detroit generally en route to Milpitas, California.

Mr. Highsaw: Just so the record is absolutely clear, we have a continuing objection technically related to this

other exhibit. I would like the record to show I have a continuing objection to any testimony based on this exhibit also.

The Court: The record may so show.

By Mr. Cummings:

Q. Whose company does the Wixom plant belong to?

A. The Ford Motor Company.

Q. How about the Milpitas plant you mentioned?

A. The Ford Motor Company.

Q. And does this document, Plaintiff's Exhibit 7, represent the 94 cars that you testified a few minutes ago were additionally diverted from the Rio Grande during the May-June, 1960 period we have been discussing?

A. To the extent human failings permit, that is a correct statement.

Q. Now, from your personal knowledge as a member of this committee that you testified about, do you personally know whether or not the Ford Motor Company in this May-June, 1960 period had any policy to try to make carriers whole for business that was lost to them during strikes?

[fol. 106] A. Let me qualify first our definition of policy. A traffic policy of the Ford Motor Company can only be one that is written and in the Traffic Policy Manual of the company. The term "policy" sometimes is loosely applied to other practices that we engage in, but there is no policy to the effect that counsel inquires.

Q. Well, in connection with the Rio Grande strike in question, did the Ford Motor Company adopt a policy to try to give back to the Rio Grande any business it had lost?

A. We did not adopt any such policy and no such routings made by this group from the Midwest to Milpitas. Neither was such makeup or restitution attempted to the assembled vehicles from Wixom, Michigan.

Q. Now, in the course of your business, did you learn whether the Ford Motor Company at Milpitas had diverted

any carloads from the Rio Grande to other shippers during this strike and the period thereafter?

A. I have so learned and I understand from a deposition that there was.

Mr. Highsaw: I object.

The Court: Objection sustained.

By Mr. Cummings:

Q. I only want your personal knowledge, whether you personally know of any cars that were diverted or—

A. I believe you said diverted. I believe you mean restored.

Q. No, diverted from the Rio Grande from your West Coast plant.

A. Oh, indeed, I have. I misunderstood you the first time. We have the freight bills and the same set of documents I referred to earlier.

Q. If you know, how many cars do those documents show were diverted from Milpitas?

A. I believe it was in the area of 60 or 61 carloads of automobiles.

Mr. Highsaw: Your Honor, since we are now off Exhibit 7 and into another area, I would like to continue my objections to this line of testimony on the grounds that it is based on hearsay.

The Court: Well, I am going to sustain the objection to this last questioning. I don't think a foundation has been laid and there have been no exhibits submitted with reference to this. Now, it is my understanding that this witness worked in the Dearborn area.

[fol. 107] Mr. Cummings: Yes, I will try to lay a foundation to satisfy you, Your Honor.

The Court: All right.

By Mr. Cummings:

Q. Was the traffic policy and routing of the Ford Motor Company under the supervision of the head office at Dearborn?

A. Yes, sir.

Q. So any decisions that were made at Milpitas would be taken in consultation with Dearborn, is that true?

A. Not necessarily.

Q. In this particular case, were there any consultations between Milpitas and Dearborn about diversion?

A. There were none with this committee I referred to, and to clarify I am referring to automobiles shipped in box cars from Milpitas to points east. Such diversions were made under the normal autonomy in an emergency of our traffic manager at Milpitas.

Mr. Highsaw: Objection, Your Honor.

The Court: Well—you made an objection?

Mr. Highsaw: Yes.

The Court: Well, this merely—what are you objecting to?

Mr. Highsaw: He stated diversions were made at Milpitas, as I understood it.

The Court: He said they were made at the direction of the officer at Milpitas.

Mr. Highsaw: That's right, and I would say this is hearsay. Not at the direction of this committee.

The Court: Well, I think this helps you. This is the reason I can't understand your objection. Unless something further develops with reference to his knowledge, I am not going to permit this testimony in.

Mr. Highsaw: All right, I will withdraw that objection.

The Court: All right.

[fol. 108] By Mr. Cummings:

Q. Would you tell the Court please, Mr. Crawford, what if any supervision and control was exercised by your office in Dearborn over the Milpitas traffic office?

A. We normally control all movements from Milpitas of this type. We also normally have standing instructions with the local traffic management throughout the country for that matter to exercise judgment superior to ours based

on the local considerations. Subsequently this diversion occurred and we have recovered the freight bills and summarized these.

Q. Have you personally in Dearborn or somebody personally in Dearborn under your supervision and control examined these freight bills in order to determine that 62 box cars had been diverted by Milpitas from the Rio Grande?

A. No, sir, we directed Mr. McCown, our traffic manager at Milpitas, to perform that survey. .

Q. Did he send the survey to you?

A. No, sir.

Q. Were the freight bills sent to Dearborn?

A. To the best of my knowledge, they are there now. They may not have been awhile ago. Our normal practice is to send all freight bills to Dearborn.

Q. But, at any rate, you did not make a personal study of the freight bills, learning this diversion had taken place?

A. I didn't.

Q. During this May-June, 1960 period, did the Rio Grande endeavor to persuade Ford not to divert and to restore any diverted business?

A. At all levels of our company, Rio Grande officials, but specifically at my case at my office, made continuing solicitations and promise to maintain service and sought not to have us issue a diversion instruction such as we finally did.

Q. After you did decide to divert and these diversions took place, did the Rio Grande make any efforts to cause you to change your mind or get business in the future?

A. I can only answer this realizing that it is four years past. Much verbal discussion occurs at a time like this between the carrier and ourselves, I repeat, at all levels of our organization. It would be impossible for me to specifically analyze that they did or did not continually solicit. The answer I would speak for myself, is, yes, they did continually solicit. They offered assurances that man-

agement would operate the trains to a limited extent. They offered assurances they would persist in their litigation to offset this. These were related to me by persons such as Mr. Bradford, Mr. Key of Rio Grande, and so forth. [fol. 109] Q. During your service at Ford Motor Company in your position, have strikes occurred with other carriers?

A. For the sake of the record, I have been with the company fifteen years and my present position six and there have. I speak with that much background and there have been numerous strikes.

Mr. Highsaw: I move this is irrelevant.

Mr. Cummings: I was going to try to establish the company ordinarily requires preliminary injunctions before they give business to carriers. This was preliminary to doing that, to show the company had developed a policy.

The Court: The objection is overruled, or, the motion to strike is denied.

By Mr. Cummings:

Q. Now, with respect to the strikes on other carriers and indeed with respect to the strike on this carrier, was it Ford's policy ordinarily to wish a preliminary injunction to be issued against a strike before Ford would restore business that had been diverted?

A. Repeating my definition of policy, it was not a policy, it was a practice, however, by local circumstances of each strike, and they are all different, to advise the management of the particular railroad that the best assurance we would like to see is indeed an injunction or restraining order. However, under certain circumstances, when a railroad management, and I speak in terms of vice-presidency or higher, assures us that management personnel can cope with our movements for a reasonable period of time, we would weigh such assurances as against the more firm assurance of a restraining order and make a decision at that time.

Q. Were such assurances given to Ford by the Rio Grande before a preliminary injunction issued in this case?

A. Throughout the several days before and after the diversions, yes, such assurances were made in several forms. We nevertheless considered it prudent to divert the shipments.

Q. What caused you to restore the shipments? These assurances that you spoke of or something else?

A. I believe the term is the extension of a restraining order. In any event, there was some successful degree of litigation from the railroad's standpoint, and that service would continue as a result. We weighed that again another time and felt from the looks of things that we could safely restore shipments via the Rio Grande and we did so.

[fol. 110] Q. In connection with Exhibits 5 and 7 of the plaintiff, both contain a column entitled "Charges" or "Freight Charges". Were those the charges that were paid by the Ford Motor Company in the instances shown on those exhibits?

Mr. Highsaw: Your Honor, I don't have any objection to the substance of the question. I think it ought to be clarified and made clear what is referred to is the total freight charges, not just the Denver-Rio Grande part.

Mr. Cummings: We are willing to accept that modification.

The Court: All right.

A. The freight charges shown in Exhibits handed me numbered 5 and 7 of the plaintiff are the charges drawn off or extracted from the freight bills. They represent, for example, the total cost to Ford or charge made by the railroads for the movement from Wixom, Michigan, for example, to Milpitas, California, the total compensation for the entire journey.

Q. Just to clarify your testimony, the 212 diverted cars you mentioned as having been diverted during this strike and the period thereafter do not include any cars that

might have been diverted from Milpitas on an eastbound movement, isn't that true?

A. They do not include such cars.

Q. They were all westbound, right?

A. Yes, sir.

Cross examination.

By Mr. Highsaw:

Q. Mr. Crawford, before the decisions were made to which you have testified concerning the rerouting of traffic, did you personally make any efforts to contact the Brotherhood of Railroad Trainmen or any representative thereof to find out what their intentions were, stated intentions were, with respect to the matter?

A. No, sir, I did not, and we would not normally do so.

Q. Did insofar as you know anyone in your department or Ford Motor Company make any such effort?

A. Of course, sir, that would be hearsay, but I cannot speak for all the people in the company who might have. Anything I would say on that is conjectural.

Q. In other words, you don't know?

A. That's right.

Q. Within your personal knowledge, was any request made to the Ford Motor Company by the Denver and Rio Grande to increase shipments of parts to Milpitas, California after the reroutings were resumed to make up for any diversions that had previously occurred?

[fol. 111] A. There were no such solicitations presented to me personally. I do not know of any having been made to any of the important persons in Detroit who might command such a decision.

Q. Would your answer be the same if I asked you with respect to these other diversions, namely shipments from the Wixom plant and shipments from the Milpitas plant east?

A. I have to repeat that six or eight individual traffic managers of the company are involved here and I can't speak as to whether or not such solicitations were made.

Q. None were made to you?

A. That's correct.

Q. And you know of no other?

A. I know of no other.

Q. Do you know on what date the Ford Motor Company ordered the restitutions of the reroutings that you testified about?

A. Our wire is dated June 1, 1960.

Q. And what did that do?

A. It closes with the expression, "Please resume normal routing via D&RGW."

Q. Did that contain the statement that the union and railroad officials have agreed to a court decision of their dispute?

A. I believe this an exhibit, but, in any event, reading, "Mr. Bradford, Vice-President of the Rio Grande, advises restraining order prohibiting employees to strike still in effect. Union and railroad officials have agreed to a court decision of their dispute."

Mr. Cummings: That's from Plaintiff's Exhibit 6, Your Honor. That was received.

By Mr. Highsaw:

Q. Do you know what date, Mr. Crawford, that the information that the union and railroad officials had agreed to a court decision of their dispute was received by the Ford Motor Company in Dearborn?

A. There is no record of such information, so I presume it was a telephone call from Mr. Bradford and I would imagine a day or two before the date of June 1. Recalling that this was over a weekend and a holiday of May 30th, it is difficult for me to say just what day it most logically might have been received.

Q. Mr. Crawford, I would like to read to you from pages 24 and 25 of your deposition, which was taken on March 6, 1964, about your testimony on this point. I will show it to you after I have read it to you and ask you if that is your testimony. Question: "Mr. Crawford, do you know the date on which Mr. Bradford of the Denver Rio Grande gave the Ford Motor Company advice that was referred to in Exhibit 3?" Exhibit 3 is the same as Exhibit 6, I think. Answer: "I do not have positive evidence of the [fol. 112] exact date. As I recall, it was the 27th of May." Would that still be your testimony about that, after I have read that to you?

A. Yes, sir.

Q. At any time prior to May 27, 1960, Mr. Crawford, did anyone from the Denver and Rio Grande advise you that the Brotherhood of Railroad Trainmen was willing to stipulate the maintenance of the status quo until the Court had had a full opportunity to pass on the legal issues presented by the injunction request?

A. There is no written evidence of such matter being discussed. I can only presume under circumstances at that time, four years ago, yes, it would have been discussed. No, I have no exact precise memory of the date.

Q. In other words, you don't recall that any such advice was given to you prior to May 27th?

A. I believe I said it probably was. I don't recall a specific transmittal.

Q. Yes, and do you know whether or not—do you have any further information than what you have just said as to whether any such advice was given to anyone else in the Ford Motor Company?

A. I have canvassed the individuals involved. One is deceased and one is in Europe, so it is difficult to ask them all. They would have the same general answer that I would have, probably it was, they don't know the specific date.

Mr. Highsaw: That's all, Your Honor.

The Court: I would like for you to go back and read the question. I want to hear the basic question to which these last answers relate.

The Reporter: "At any time prior to May 27, 1960, Mr. Crawford, did anyone from the Denver and Rio Grande advise you that the Brotherhood of Railroad Trainmen was willing to stipulate the maintenance of the status quo until the Court had had a full opportunity to pass on the legal issues presented by the injunction request?"

The Court: Do you have any further questions of the witness?

Mr. Cummings: Yes, a few questions.

Redirect examination.

By Mr. Cummings:

Q. You may have answered this when Mr. Highsaw was questioning you, Mr. Crawford. Did anybody from the [fol. 113] Brotherhood of Railroad Trainmen ever give you any advice of any offer to maintain the status quo?

A. I did answer on the point. I believe I said no one to me personally, that I couldn't speak for the relatively large number of traffic managers elsewhere in the country.

Q. With respect to Plaintiff's Exhibit 6, which is that June 1, 1960 telegram of Mr. Ward's, and Plaintiff's Exhibit 7, which is the Wixom diversion, I notice that goes through June 4, 1960. Did it take sometime for the restoration of business to the Ford Motor Company after the issuance of the June 1 telegram?

A. I would have to answer that in rather careful terms due to the phenomenon of transit time and when the car would arrive on the Rio Grande, say, at Denver. Using this exhibit, specifically, on the fifth page we show the cross-over, as I label this, on a shipment dated June 1 billed June 3. Now, that occurred practically instantaneously with the June 1 wire, because this shipment was made by a traffic manager at Wixom, which is in Detroit.

so we show that we swung back to the Rio Grande the same day of the wire. I know just from my general knowledge of this type of thing, however, that a similar instruction to that one there would in turn have to be relayed to outside suppliers, such as Budd Company in Philadelphia, and that transmittal might take one or two days, and if Budd was shipping nothing to Milpitas for another day there could be as much as two or three days of restoration of a routing. Similarly, there is that same delay as diverted shipments. That might show up in several more days before arriving at Denver or Pueblo in interchange with the Rio Grande.

Q. With respect to these companies shown on Plaintiff's Exhibit 5, did the Ford Motor Company instruct those companies or cause them to divert the business from the Rio Grande?

A. I don't believe I understand your question.

Q. Well, there are several companies listed, Budd and Warner Gear and so forth. Were those Ford shipments that Ford controlled?

A. Oh, indeed, these are basic shipments subject to Mr. Ward's first wire that said "divert" and the instructions would have gone from Ward to this gentleman by the name of Morcom and he in turn would hand these on to the Budd Company, in the example you used, or any other supplier of the company.

Mr. Highsaw: I object to that last answer and move it be stricken on the grounds it is hearsay.

[fol. 114] The Court: The objection is sustained and it will be absolutely stricken.

By Mr. Cummings:

Q. In the course of your work for Ford Motor Company, does your committee and do you personally give orders to shippers like Budd that are doing business with Ford as to how to ship their parts?

A. I have to explain that in the normal Ford organization chain of command direction from my office normally would go through a division office and then a plant office and then finally to the outside supplier. In a case of supreme emergency we can issue orders directly. That is extremely rare. In the normal course of events, such as this one here, a diversion order is issued by us to another Ford Motor Company employee and then perhaps another to arrive as an order to the outside parts supplier.

Q. And the outside supplier accepts the instructions given, what you call the Ford order?

A. We verify this, as I said, with the deviation form, as well as with the actual surveillance of freight bills.

Q. So your answer would be yes?

A. Yes.

Mr. Cummings: That's all.

Mr. Highsaw: Your Honor, there are just a couple of matters I would like to clear up.

Recross examination.

By Mr. Highsaw:

Q. Looking at Exhibit 5, on the back page, these various plants are listed. Have you got that? Budd, Philadelphia. Is that owned by Ford or is that an outside plant?

A. I noticed in some earlier conversation you referred to it as Ford. It is an entirely independent company.

Q. I did think it was Ford.

A. Well, we are the important customer, but we don't have anything to do with them.

Q. What about Chicago Heights?

A. That is a Ford Motor Company stamping plant.

Q. And Eaton?

A. That's independent.

Q. Monroe?

A. Monroe is a Ford Motor Company stamping plant.

Q. And Warner Gear?

A. That is a completely independent supplier.

[fol. 115] Q. Sterling?

A. Sterling is a Ford Motor Company chassis plant.

Q. And Rouge?

A. Is a complex of essentially ten major Ford Motor Company plants.

Q. All of the shippers there are the Ford Motor Company?

A. Yes.

Q. One more question. At the time this decision you have referred to with respect to rerouting was taken, were you aware that the strike had been called off by the Brotherhood? You have heard Mr. Carroll's testimony this morning as to calling off of the strike. Were you aware of that fact at the time you took this decision?

Mr. Cummings: I don't think he testified he called off the strike. The restraining order was issued at seven o'clock and that stopped the strike.

Mr. Highsaw: I think he testified he called the people concerned and called off the strike. Regardless of what he testified, I will rephrase the question. Were you aware the strike had been called off at the time of this decision?

A. Subject to the delays of communication, we were aware first there was a work stoppage for several hours and following that time that the work stoppage ceased. We still felt it prudent to sustain our diversion.

Q. Now, with reference to these time matters, referring back to Plaintiff's Exhibit 4, Mr. Crawford, am I correct that you testified that this Mailgram was sent out on May 18th and the reroutings are effective May 19th?

A. My copy of the diversion wire given to me personally is marked effective May 19th.

Q. Exhibit 5 actually shows shipments occurring on May 19th, does it not? I am referring to page 4, I believe I am looking at, Your Honor.

A. I can't lay hand on that copy at the moment.

Q. I will show you mine so you can verify the correctness of it.

A. Yes, sir, there are certain dates marked there, the earliest of which is 5-19.

Q. Now, this is also true, is it not, of the document that has been identified and received as Plaintiff's Exhibit 7 there, where there are shipments there that are marked May 19th?

A. Yes, sir, there are.

[fol. 116] H. F. BURNAUGH called as a witness by the plaintiff, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Cummings:

Q. Would you give your name and address?

A. H. F. Burnaugh.

Q. And what is your position if any with the Rio Grande?

A. Address is Denver, Assistant Vice-President of Traffic.

Q. Did you occupy that position during May and June of 1960?

A. May and June, 1960, I was Assistant to the Vice-President of Traffic.

Q. Are you familiar with the situation that arose during the time of the strike and immediately thereafter?

A. Yes.

Q. Did any shippers, to your knowledge, divert any business from the Denver and Rio Grande during that period, May and June of 1960?

A. Yes, sir.

Q. What companies did divert, if you know?

Mr. Highsaw: Your Honor, I object to this without first laying a foundation as to the basis of his knowledge.

The Court: The objection will be sustained.

By Mr. Cummings:

Q. Very well, what is the basis of your knowledge, Mr. Burnaugh? How did you learn it was diverted? As part of your duties in the traffic department?

A. At this time it was my duty to keep our various offices throughout the country advised as to the situation on our railroad with respect to the strike that was called, with respect to the restraining order that was issued, and ask those offices to make every effort to avoid the loss of traffic to us because of the situation.

Q. Well, in the course of that work for your company, did you learn of any companies that diverted business from the Rio Grande because of this strike?

A. I was very definitely told by the Ford Motor Company that they were going to remove us from the routing of their traffic and endeavored to get them to not do it, but their policy was that it would be taken away.

Mr. Highsaw: I move that that statement be stricken, Your Honor, on the grounds that it is hearsay.

[fol. 117] Mr. Cummings: It was something he was told personally.

The Court: The motion is denied. This ties in with Crawford's testimony.

By Mr. Cummings:

Q. Again, as part of your duties at that time in the traffic department, I will ask you what other shippers if any diverted from the Rio Grande during the course of this strike?

Mr. Highsaw: May I have the question read back? I didn't quite catch it.

(The reporter read the pending question.)

Mr. Highsaw: Your Honor, I object to that question without a foundation being laid as to the source of whatever information he is going to testify about and how he got it.

The Court: Objection sustained.

By Mr. Cummings:

Q. Very well, Mr. Burnaugh, would you relate to the Court what information you obtained and how you obtained it?

Mr. Highsaw: That will also include from the specific people?

Q. (Continued) And also how you learned it, namely from what persons.

A. We asked all of our offices, traffic offices, to advise us of shippers who diverted traffic from us during this period and the number of cars that were diverted and that information is included on this exhibit.

Q. And did that information come to you as a part of your duties at the Denver and Rio Grande?

A. It did.

Mr. Cummings: I think there is a sufficient foundation, Your Honor.

Mr. Highsaw: Your Honor, I move—well, he hasn't testified yet as to any diversion, but I would object to any questions as to any diversion from any other companies other than Ford which we have now covered on the grounds that it is very clear that what he is saying is information [fol. 118] which has come to him from traffic people out in the field of the Denver-Rio Grande, and without any indication of the source of their information. They might have picked it up in a discussion in a barroom someplace as far as the record shows. I think it is very clearly hearsay and incompetent evidence.

Mr. Cummings: (To witness) We only want you to testify as to what you learned, as you say, from your own traffic officers during the period.

The Court: I think the objection must be sustained. You are predicating your basis for your damages here on this testimony and it is not direct enough. It is hearsay. It isn't the same situation you had with reference to Ford, and I sustain the objection.

By Mr. Cummings:

Q. In the course of your business in the traffic department, have you personally been advised of any companies that diverted—let me finish the question, please—that diverted business from the Rio Grande during this strike?

Mr. Highsaw: Objection on the same grounds, Your Honor. It is the same question.

The Court: Objection sustained.

By Mr. Cummings:

Q. During this period, did you or your department give any instructions to your freight agents with respect to endeavoring to hold business during this strike and the period thereafter?

A. Yes, we advised all of our offices that this strike had been called, also that a temporary restraining order had been secured and asked them to urge all of our shippers to not divert traffic from us.

Q. Now, did any of these men in your employ send you reports as to any shippers that nevertheless insisted on diverting freight from the Rio Grande? Did any reports come to you as part of your duties with the Rio Grande? A. Yes.

Q. And what did these reports show?

Mr. Highsaw: Objection, Your Honor.

Mr. Cummings: These are reports from his own men. [fol. 119] Mr. Highsaw: It is the same difficulty, Your Honor.

The Court: The objection is sustained. Mr. Cummings, I think we are going to save some time here—if you intend

to elicit from this witness evidence that he obtained from agents of the Rio Grande over the country and it will not be supported by the shipper themselves or documentary evidence from the shippers showing that there were diversions made, the Court will not allow such testimony over objection of the defendant, and it is obvious that the defendant is objecting to it, so I suggest that if this is what you propose to do by this witness and knowing the Court's feeling in the matter that you make an offer of proof for the record and that way the record will reflect what you intend to establish here.

We will take a brief recess.

(The Court recessed from 10:35 o'clock a.m. until 10:48 o'clock a.m.)

Mr. Cummings: If the Court please, my offer of proof through this witness would be that Kennecott Copper Company diverted 10 cars of copper bullion from Garfield, Utah to Baltimore, Maryland, Denver and Rio Grande revenue, $4,089.87. Chicago Bridge and Iron diverted eight cars of steel from Chicago to Salt Lake City, Utah, Denver and Rio Grande revenue, $4,532.51. Commercial Shearing and Stamping Company, six cars of steel from Chicago to Salt Lake City, $3,399.38. Welch Planing Mill diverted three cars of lumber from Midvale, Utah to Marshfield, Wisconsin, Denver and Rio Grande revenue $779.52, and the Ruberoid Company diverted two cars of roofing, Denver to Salt Lake, Denver and Rio Grande revenue, $1,021.76, and the witness received this information from his own company's freight agents.

The Court: Will you have any documentary evidence that would support this other than a summary?

Mr. Cummings: Not present in court, Your Honor.

The Court: All right.

By Mr. Cummings:

Q. Mr. Burnaugh, during the course of the strike, did you cause certain telegrams to be sent under the name of

Mr. Bradford to various people throughout your organization?

A. I did.

[fol. 120] Q. And what did those telegrams advise the people throughout—

Mr. Highsaw: I object, Your Honor. The best evidence is the telegram.

Mr. Cummings: Well, if you want them put in, they are all attached to the answers to the interrogatories.

Mr. Highsaw: Let me take a look at them and see.

The Court: All right.

Mr. Highsaw: Are you referring to the—

Mr. Cummings: Ones attached to the answers.

Mr. Highsaw: Just show me which ones you have in mind.

(Counsel examined documents.)

Mr. Highsaw: Your Honor, I don't wish to be unduly difficult, but it seems to me that we get into a problem. We have got a number of documents here and having somebody give a general description of what all these documents say—

Mr. Cummings: We would be glad to offer them.

Mr. Highsaw: I think the best thing is put them in evidence, I am not going to object to them, and let them speak for themselves.

The Court: All right.

Mr. Cummings: We will have them marked as collective Exhibit 10, if we may.

(Plaintiff's Exhibit 10 was marked for identification.)

Mr. Cummings: May collective Exhibit 10 be received in evidence, Your Honor?

The Court: Yes.

[fol. 121] (Plaintiff's Exhibit 10 for identification was received in evidence.)

The Court: It was my understanding that there was no objection.

Mr. Highsaw: No, I have no objection. Just for clarification, Your Honor, some of these telegrams it is obvious to whom they were sent, but in others it is not quite clear and I would like to have it identified on the record as to who these people are.

Mr. Cummings: We will do that through the witness or you can do it in cross-examination.

Mr. Highsaw: Well, either way is all right.

By Mr. Cummings:

Q. Showing you Plaintiff's Collective Exhibit 10, are the persons listed on the first page as recipients of the telegrams traffic agents with the Rio Grande?

A. These are all Vice-Presidents of Traffic of our connecting lines. The balance are our own people.

Q. So only the first eight are connecting lines and the rest are your people, is that right?

A. Right.

Q. And the third page is directed to all traffic agencies. Does that refer to your traffic agencies?

A. That's our traffic agencies.

Q. And then the next telegram, June 2, 1960, the same holds true as the first telegram of July 11, 1960, as to the recipients?

A. Right.

Q. Who was Mr. Lucas?

A. General agent at San Jose, California.

Q. That's listed in May 27, 1960, and Mr. Conrad in the May 25, 1960 communication, who is he if you know?

A. Vice-President, Rock Island, at that time, Chicago.

Q. And this wire of May 26, 1960, the same recipients as the first wire?

A. Right.

Q. To whom did the wire of May 20th go?

A. That was a wire from the traffic manager, Missouri Pacific, St. Louis, to our traffic manager, Borden, Denver.

Mr. Highsaw: Just one moment, which documents are we talking about now?

[fol. 122] Mr. Cummings: We have been going through them consecutively.

Mr. Highsaw: I understood when we started out you were confining this to documents which the witness has sent under the name of R. K. Bradford, but you are now talking about a telegram that was sent by a man on another railroad.

Mr. Cummings: I understood you to say you would like to have all these in to save time.

Mr. Highsaw: No.

Mr. Cummings: We will confine the ones that we have been offering and were received to those signed by Mr. Burnaugh or by Mr. Bradford.

The Court: All right.

A. (Continued) First one is this one of May 16th.

Q. We don't have to go through them again. And, on May 19, 1960, there is a memo signed R.K.B. Is that one of Mr. Bradford's?

A. That's Mr. Bradford.

Q. And that's true on May 19, 1960?

A. That's right, that's our man in Chicago.

Q. May 18, 1960, is yours?

A. Right.

Q. To Mr. Bradford?

A. That's right, mine.

Q. May 18, 1960 is signed by you and addressed to whom?

A. J. D. Key, general agent, Detroit.

Q. May 19, 1960, is from you to Mr. Bradford, right?

A. Right.

Q. And May 18, 1960, the same, and the final one is the same recipients as the top one, isn't that true?

A. Right.

Q. During the course of this strike, did you communicate at all to any shippers over the telephone or otherwise?

A. Yes, I did. I talked to Mr. McCown, traffic manager at Ford Motor at Milpitas, several times.

Q. What was your conversation?

A. Endeavoring to get Mr. McCown to not divert their traffic from us.

Q. Were there any other shippers that you personally solicited to keep the Rio Grande business?

A. Other than that, I do not recall any.

Q. Did you or did you not keep Mr. McCown advised of the status of the strike?

A. I did.

[fol. 123] Q. And that goes to the period immediately following the strike in May and June of 1960, too?

A. Yes.

Q. Now, from information given to you personally, do you know from your records whether or not the Ford Motor Company at Milpitas attempted to restore any business to you that was lost during the strike?

A. No.

Q. Your records show no such restoration of business, is that your testimony?

A. None that we could identify.

Q. And did your associates, if you know, in the traffic department, at the same time you were endeavoring to obtain back the Ford business from Milpitas attempt to obtain business back from other shippers?

A. Yes.

Q. And their conversations with other shippers, to your knowledge, would have been similar to yours with Mr. McCown?

A. I would presume so.

Mr. Highsaw: Your Honor, I am going to have to move to strike this last answer because the only testimony we have in the record so far with respect to shippers is the Ford Motor Company.

The Court: The last answer will be stricken.

By Mr. Cummings:

Q. Do you personally know whether or not anyone in the Rio Grande solicited any other shippers during the course of this strike and the period following?

A. Well, it is a duty of our traffic representative—.

The Court: Well, you could answer that yes or no, Mr. Burnaugh.

A. (Continued) Yes.

Q. And what is that knowledge?

A. That all of our representatives were endeavoring to retain traffic for the railroad and to get back traffic that had been taken from us.

Q. For the record, would you identify the Mr. Dan McCown you mentioned at Milpitas?

A. Dan McCown is traffic manager, Ford Motor Company, Milpitas plant.

Q. Did he occupy that position in May and June of 1960?

A. He did.

Q. He still occupies it, you say?

A. Yes.

Mr. Cummings: That's all.

[fol. 124] Cross examination.

By Mr. Highsaw:

Q. Mr. Burnaugh, did you give any instructions to any of the traffic solicitors or agents of the Denver Rio Grande under you during the period May 16th to June 1, 1960 to request the Ford Motor Company to increase the volume of their normal shipments over the Denver and Rio Grande when they again routed traffic over your carrier in order to equalize any diversions that had taken place?

Mr. Cummings: I object to this line of questioning, Your Honor, on the ground that I gave in my opening statement, namely that this is a tort case so it is immaterial whether

third parties ever made the plaintiff whole, and I have several citations, including one from the Tenth Circuit, which I would be glad to cite to the Court because it will be a continuing matter. Perhaps it should be disposed of now.

The Court: All right, I will hear it.

Mr. Cummings: The case in this Circuit to which I have reference is Grayson versus Williams, found in 256 Federal Second 61, a tort case, and the one point in question was whether plaintiff was entitled to recover even though his expenses had been paid by a third party, and in allowing full damages the Court stated as follows:

"Where a part of a wrongdoer's liability is discharged by payment from a collateral source," such as Mr. Highsaw is endeavoring to show here, "the question arises, who shall benefit therefrom, the wrongdoer or the injured person. No reason in law, equity or good conscience can be advanced why a wrongdoer should benefit from part payment from a collateral source of damage caused by his wrongful act. If there must be a windfall, certainly it is more just that the injured person shall profit therefrom rather than the wrongdoer shall be relieved of full responsibility for his wrongdoing."

"We think this conclusion is supported by the great weight of authority," citing Hudson versus Lazarus from the Court of Appeals in the District of Columbia, and saying that it, "held that an injured person may usually recover in full from a wrongdoer regardless of anything he may have received from a collateral source, and it is stated that the best interests of society as well as the purposes of the parties are likely to be better served if the injured person benefits rather than the wrongdoer benefiting." If you would like to hear similar rules from other circuits, I will be glad to give them.

[fol. 125] The Court: No, I will hear if Mr. Highsaw has any response.

Mr. Highsaw: Yes, I don't think that what Mr. Cummings is arguing here has any application to what we are

trying to show. This is not a matter of being reimbursed from an injury from a collateral source.

What we are trying to determine here is what the extent of the injury actually was and in this case the injury that is claimed is the diversion of shipments and the loss of revenue from shippers not shipping over the Denver and Rio Grande, and if in one week the shippers don't ship ten cars and then in the next week they ship twenty cars it is our position that the railroad has no loss. It is not a matter of being reimbursed from a collateral source.

The Court: The objection will be overruled. I am going to receive the evidence, and in so doing I am not going contra to the decision which you read from, Mr. Cummings, or at least I am not intending to.

I am receiving it in line with the statement of Mr. Highsaw that they are offering the testimony as evidence of the actual loss of business that was sustained by the railroad.

Mr. Cummings: Well, Your Honor, the business was lost, and under these cases it is immaterial that perhaps later on they got other business.

Reading from Restatement of Torts: "It is a well-settled principle of law that a tort feasor cannot escape the consequences of his wrongdoing merely because his victim was fortunate enough to receive reparation from a collateral source."

Mr. Highsaw: Our position, of course, would be the carrier can't pick an arbitrary date and say, "Cut it off, that's the date at which we have lost." You have to look at the whole picture.

The Court: Yes.

Mr. Highsaw: I will rephrase my question.

By Mr. Highsaw:

Q. Mr. Burnaugh, my question is, Mr. Burnaugh, whether between May 16, 1960 and June 1, 1960 you gave any instructions either written or oral to any Denver and Rio

[fol. 126] Grande representatives or anyone under you to request the Ford Motor Company to increase their shipments to you when their reroutings commenced in order to equalize any amount of any diversions which had taken place during the period May 16th to June 1st?

A. I did not, for the reason that—

The Court: You don't need to go on. You have answered the question. If they want the reason, they will ask you.

Mr. Highsaw: That's all I have.

Redirect examination.

By Mr. Cummings:

Q. Mr. Burnaugh, I will ask you the reason that you were just about to testify to?

A. Knowing the policy of the Ford Motor Company in establishing the routing of their setup automobiles and parts in which they allocate to us a certain percentage of their business, it is very difficult for them to change that status to make up business that was completely taken from us during this period.

George F. Fitz-William, called as a witness for the plaintiff, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Cummings:

Q. Would you please state your name and address?

A. George F. Fitz-William, 1531 Stout Street, Denver, Colorado.

Q. What is your position with the carrier?

A. General Freight Agent.

Q. Stationed here in Denver?

A. Yes, sir.

Q. Showing you Plaintiff's Exhibit 3 for identification, I will ask you whether you prepared or caused to be prepared the information shown as the Denver and Rio Grande Revenue loss on shipments that were diverted during the strike?

A. I did.

Q. And you are responsible for the work shown on this exhibit up to the line on the second page that goes across the page?

A. Line across the page.

Q. Do you have a copy of that?

A. Yes, sir.

Q. Now, as a result of your work in obtaining the figures on the Denver and Rio Grande Revenue that was lost, how much did you determine was lost during the course of this strike?

[fol. 127] Mr. Highsaw: Your Honor, I am going to object to that question and unless it is limited and I think we might as well now bring it out and object to the exhibit unless it is limited. I have several objections, so I think it would be better to take them up one at a time.

This exhibit, down to line 7, deals with the Ford Motor Company, or down to line 9, deals with the Ford Motor Company, so at this point—I will come back to that in a moment, but beginning with line 10, 11, 12, 13 and 14, the exhibit deals with alleged estimated loss of revenue sustained by the Denver and Rio Grande from shippers, of which there is no evidence in the record, and I would move that those lines, first, be stricken from the exhibit and that no testimony be permitted with respect to those lines.

These are the companies that Mr. Burnaugh was attempting to testify about.

Mr. Cummings: Well, with that suggestion would you have any objection to the admission of this exhibit?

Mr. Highsaw: Well, then line 15 becomes completely meaningless because the figures—

Mr. Cummings: It would have to be corrected, yes.

Mr. Highsaw: The line of figures in line 15 are wrong. That's my first objection, and my second objection, Your Honor, is that from lines 1 to 8, which deal with the Ford Motor Company—and I know this has already been ruled on, but in order to keep the record straight I would want to object to that as a part of my continuing objection dealing with the Ford Motor Company.

Mr. Cummings: 1 through 9?

Mr. Highsaw: 1 through 9, and, finally, Your Honor, on page two of this exhibit, it contains data relating to the Denver and Rio Grande Western expenditures for the year of 1960.

Mr. Cummings: I don't intend to ask this witness about it. We have another witness.

[fol. 128] Mr. Highsaw: You won't offer that at this time?

Mr. Cummings: I will be glad to—

Mr. Highsaw: Then I won't make that objection. I will confine myself to the objections I made.

Mr. Cummings: Are you objecting to the receipt of this exhibit if we delete lines 10 through 14 and change the addition?

Mr. Highsaw: I would have to object to the whole exhibit on the basis of my continuing objection so that the record is straight. As far as the rest of the lines, 10 through 15, I would object to it, as I said, on the ground that there is no evidence in the record supporting it, and although Mr. Cummings said he is not going to elicit testimony from this witness he is about to offer this exhibit which contains this material down at the bottom about which I have a very basic objection, which is a third and entirely separate objection.

Mr. Cummings: We are willing to confine our offer to everything above the black line there on that page and with the deletions you suggest.

Mr. Highsaw: All right, I won't go any further then.

The Court: Well, for the Court to be consistent at this point, it would seem that if the exhibit—and I have not

seen it, so I don't know what is on the first nine lines, but I assume from the colloquy or statements of counsel this relates to the Ford Motor Company shipments about which we have had some testimony. Now, I would receive all of the evidence relating to Ford Motor Company shipments that Mr. Crawford testified to, the 212 approximately cars. I don't recall the number. Yes, it is 212 cars.

Mr. Cummings: That's excluding those from California.

The Court: Yes, that's right. I will receive that in evidence, and this would be consistent with my previous ruling, of course, and the other, if there is evidence in those first nine lines about the 64 cars shipped eastward from the California plant, Milpitas, I would have to sustain that at this time.

[fol. 129] Mr. Highsaw: Yes, they are on line 2.

The Court: Yes. Well, I would sustain the objection to that part of the exhibit at this time.

Mr. Cummings: Your Honor, if we could just interrupt the witness for a moment, I think we can straighten that out. We were planning and so was Mr. Highsaw planning to offer the deposition of Mr. McCown, marked Exhibit 9.

Mr. Highsaw: I have no objection to the offer of Mr. McCown's deposition, and on that basis I have no objection to the inclusion of line 2 in Exhibit 3.

The Court: All right then, the first nine lines of the exhibit will be received.

(Plaintiff's Exhibit 3, the first nine lines, were received in evidence.)

The Court: Do you want to mark this, Mr. Clerk?

Mr. Cummings: Yes, that's Plaintiff's Exhibit 9.

The Court: Oh, you already have marked it?

The Clerk: We marked their copy.

Mr. Cummings: Will you mark the Court's copy, please, and we will withdraw this?

(Plaintiff's Exhibit 9 was marked for identification.)

By Mr. Cummings:

Q. Mr. Fitz-William, can you make a rapid calculation and take out the last few lines and just total up from the first nine lines as to the Denver and Rio Grande Revenue that was lost?

A. I did during the recess as far as the righthand column is concerned, and that would total $89,743.38.

Q. Eighty-nine thousand, what was it?

A. Seven hundred forty-three dollars and thirty-eight cents.

Q. So that should be substituted for the $103,566.42 on the second page of this exhibit?

A. Yes. Yes, sir, I didn't calculate the difference in weight or the freight charges. The number of cars would be 274 then.

[fol. 130] Mr. Cummings: For the Court's information, at page 55 of Mr. McCown's deposition, which now has been received as Plaintiff's Exhibit 9, he did testify that 62 cars had been diverted and that's why that figure has been used in this exhibit.

The Court: Page 55?

Mr. Cummings: I thought it was 55, I may have the wrong page.

Mr. Highsaw: While we are on that subject, Your Honor, I would like to call Your Honor's attention, so you have it in mind now, that on pages 42, 46, 51 and 52 of that deposition, Mr. McCown said that he equalized these shipments and gave the Denver and Rio Grande immediately after May 26, 1960, 62 cars, which he would have otherwise shipped over the Union Pacific.

Mr. Cummings: Page 51, Your Honor. I was wrong. It was 62 cars diverted.

The Court: All right, and I have noted the pages that Mr. Highsaw gave.

Mr. Highsaw: 42.

The Court: 46, 51 and 52, those were the numbers I got.

Mr. Highsaw: That's right.

By Mr. Cummings:

Q. Now, Mr. Fitz-William, in preparing this exhibit, how did you arrive at the Denver and Rio Grande division?

A. By applying the established published divisions to the freight revenue.

The Court: I didn't quite understand.

The Witness: By applying the established published divisions to the freight revenue. We have division sheets.

The Court: Yes, I understand it now.

By Mr. Cummings:

Q. So, through those sheets, you arrived at the Denver and Rio Grande division of freight charges shown in the next to last column?

A. Yes, sir.

[fol. 131] Q. For the purpose of the record, you might explain what a division would be for the D&RG.

A. On line 1, for example, covering the automobiles on trailer, on flat cars, from Detroit to Salt Lake City, Wabash to Kansas City, CNRP to Denver, thence the D&RGW, the published divisions are in WTL Division Sheet 500-A broken over East Hannibal, and over west of East Hannibal the division is broken over Kansas City and the division published in WTL Division Sheet 700, and then west of Kansas City is divided over Denver on the divisions published in D&RGW Division Sheet 7213-A, and these issues provide that the D&RGW will receive 62 and a half percent of 85 percent of 76 percent of the freight charges, and that amounts to $49,338.72 when applied to freight charges of $122,200.

Mr. Cummings: Thank you, Mr. Fitz-William, that's all.

The Court: Well, just a moment, Mr. Cummings. I note on Exhibit 3 there is a percentage arrived at.

Mr. Cummings: Underneath the long line, Your Honor?

The Court: Yes.

Mr. Cummings: Yes, we didn't offer the exhibit for that purpose because of Mr. Highsaw's objection. We are taking that up with another witness.

The Court: Oh, all right, that is satisfactory.

Mr. Highsaw: When we get to that, I have another objection.

Cross examination.

By Mr. Highsaw:

Q. Mr. Fitz-William, I take it your testimony you just gave as to the manner in which you work this out with one shipment applies to all of them?

A. Yes, sir.

Q. These established divisions, were they the divisions that were in effect in May of 1960 or the ones in effect today?

A. No, May, 1960.

Q. Have there been changes in those divisions since then?

A. I don't believe there have been in any of the divisions that was used on this traffic.

[fol. 132] Q. If I went down to the Interstate Commerce Commission and looked in your tariffs, I could find these, could I?

A. I am not sure these are all on file with the Interstate Commerce Commission. We are not required to file them with the Interstate Commerce Commission. They would be on file in our office.

Q. If they are not on file in the Interstate Commerce Commission, what is the nature? Is this an agreement?

A. I believe with one exception, WTL Sheet 700, and that is a Commission basis and is filed. The rest of them are made by the carriers.

Mr. Highsaw: That's all.

The Court: All right, you may step down, Mr. Fitz-William.

Mr. Cummings: If the Court please, to be consistent with our offer of proof, we would like an objection noted to the deletion of lines 10 through 14 of this Exhibit 3.

The Court: Yes. Well, the whole exhibit will be in the record so if the Court made an error, why, it will just be a mathematical computation.

Mr. Cummings: Mr. Darnell, would you take the stand, please?

A. L. DARNELL called as a witness by the plaintiff, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Cummings:

Q. Mr. Darnell, would you give your name and address and position?

A. A. L. Darnell, 3039 West Denver Place, Denver, Colorado. The title of my position is Cost Analyst, Denver and Rio Grande Western Railroad.

Q. Did you have anything to do with the preparation of what has been received in evidence as Exhibit 3, up from the bottom line down on page 2?

A. I calculated some operating ratios for selected expenses.

Q. Do you have a copy of that exhibit with you?

A. Yes, I do.

Q. If you could explain to the Court, please, how you arrived at the figures shown below the full line on the second page of that exhibit?

[fol. 133] Mr. Highsaw: Your Honor, I think now is the appropriate time to make the objection I have to this line of testimony, which will also necessarily involve the last part of page 2, as this also is a part of Exhibit 3. Well, it would be limited to these figures at the bottom of 2 of Exhibit 3.

Now, the basis for this objection is this, Your Honor. The defendants served interrogatories on the plaintiff railroad back in the beginning of this lawsuit, asking them to detail their claims of damage in this situation.

On January 27th, the carrier filed an answer to those interrogatories.

Now, Question 20 of these interrogatories: "Set forth the approximate amount or total loss if any which plaintiff claims resulted from the strike alleged in the complaint not covered by Questions 8 and 14."

Question 14 related to actual operation of trains on the day of the strike. No damages were claimed. So, this covered other possible items.

21 was to furnish a breakdown.

Question 22 was to set forth how the amount or amounts furnished in response to Questions 20 and 21 were calculated.

In response to those questions, the carrier, on January 27, 1964, filed—

Mr. Cummings: You are referring to the answers of the first of the three sets of interrogatories?

Mr. Highsaw: Yes, first interrogatories filed, an Exhibit A, which included various listings of shipments and revenue, and the part we are concerned with here is at the bottom in response to Question 22, to set forth the amount or amounts furnished in response to the above questions, they gave figures covering these items that are on the last page of Exhibit 3, and the items they gave were for the year 1960. Maintenance of weight, 10.44. That compares with 10.0 in Exhibit 3. Maintenance of equipment, they gave the figure 15.09 as compared with the figure 13.09 in Exhibit 3.

[fol. 134] Under the transportation item, they gave the figure 32.14 as compared to the figure 28.53, which is set forth in Exhibit 3. The total, which was the total direct expenditures of the carrier for the year 1960, was given in this Exhibit A in answer to our interrogatories as 57.67

as compared to the total direct expenditures set forth in Exhibit 3 of 51.62, or, in other words, Exhibit 3 sets forth direct expenditures a little more than 6 percent lower.

The net which was set forth in Exhibit A to the answers to interrogatories which was applied to the claim of revenue loss was 42.33. In Exhibit 3 as a result of using a much lower direct expense figure the carrier has set forth a net of 48.38, which it applies to this figure, which we now have the record of, $89,743.38, which would be on line 15.

Mr. Cummings: The reason for that is we discovered the previous figures given in the first set included passenger trains and the costs thereof.

Mr. Highsaw: Wait just a moment, I haven't completed my objection.

Mr. Cummings: I thought you had.

The Court: Well, are you willing to accept the 42.33 net figure, Mr. Highsaw?

Mr. Highsaw: Well, I am willing to accept the figure as the figure, Your Honor, for the direct transportation costs for the entire year. I have a position that that's not the correct figure to apply to the revenue in order to get an estimate of loss, that you should apply the figure of the direct cost for operating during the month of May, 1960, which is not this figure, but I would accept the 42.33 figure as being their direct transportation cost for that year.

Now, I was coming to the fact that after they had given this 42.33 net, we then in a subsequent set of interrogatories which were answered in June of 1964 asked them with respect to each one of these items, maintenance of way, maintenance of equipment, transportation, what was the source and how it was calculated, and the carrier came back and said the source was their annual report to the stockholders and it was taken out of that and calculated [fol. 135] from that, and we now find they haven't offered it yet in evidence, but they have a document here which indicates that these figures they have in Plaintiff's Exhibit

3 are taken out of a form, an annual report to the Interstate Commerce Commission for the year ending December 31, 1960, various lines that are listed in that, and our objection is that we filed these interrogatories for purposes of discovery, to discover what their case was. This was the information they gave us.

Late day before yesterday, late in the evening, I was handed these figures and all these reports are in Washington, and I have no way of checking these. I did attempt yesterday by telephone to get some information and I managed to get some information about what their costs were during the month of May, but I haven't been able to as yet obtain sufficient information to go into this, and I think they should be held to the cost figure which they gave in answer to the interrogatories.

Mr. Cummings: Your Honor, that figure that we did give in the answer to the first of the three sets failed to recognize the fact that this is strictly a freight case and included the costs of passenger transportation. I discovered that when I got here on Monday when we were preparing Exhibit 3 and asked the witness to come up with a more accurate figure, at least one that seemed to me more accurate, one that represented only freights since this is a freight case.

Secondly, Mr. Highsaw neglected to point out in the first set of interrogatories we were claiming damages of $62,000. Now, we are down to $50,000. I should think he would be happy we are down to $12,000.

Regardless of that, that's the reason for the discrepancy, and as soon as we got the exhibit completed we were sure he got a copy. As he said, he had it since day before yesterday.

I also thought it would be more accurate to use the Interstate Commerce Commission forms and reports than merely the carrier's annual report.

The Court: Well, inasmuch as there is a variance between the percentage figures as shown on the answers to the interrogatories and the tendered exhibit, it seems to me that

the fair solution of the matter would be to require the plaintiff to utilize the lower of the two figures.

[fol. 136] Mr. Cummings: Even though as soon as we discovered it was erroneous we made it plain to the other side? We told them as soon as we discovered it.

The Court: Yes, but you were pretty late in discovering it. There is no provision in the pretrial order where there is a provision an exhibit such as this can be offered this late that I know of.

Mr. Highsaw made this a part of his objection, he didn't have time to check it. It is obvious to me he didn't have time.

Mr. Cummings: Well, the witness is here for him to check it.

The Court: I know he has been in trial as you have.

Mr. Cummings: If the witness is here for him to check it with—

The Court: Yes, but the Interstate Commerce Commission records aren't here. Well, this is my resolution of it. When these controveries come up the Judge has to decide it and I think this is the fair decision. That will be it.

Mr. Cummings: If Your Honor thinks that we should be bound by the answers to the first set of interrogatories, I will turn over to Mr. Highsaw a substitute page for the exhibit which was prepared on that basis, that included passenger costs, even though we don't think it is as accurate as the page he now has, which uses the 42.33 percent figure.

Mr. Highsaw: Let me inquire about one thing Your Honor. I am not clear when Mr. Cummings talks about this exhibit being limited to passenger cars.

Mr. Cummings: It included passenger cars.

Mr. Highsaw: The original one included, and the present one being limited only to freight cars, because when I was handed Plaintiff's Exhibit 3 I was also handed a document here which hasn't been offered which I assumed went along with this and it had all these tariff divisions on it, and then at the bottom on the second page it had the source for

what we are talking about here and he gives total rail-
[fol. 137] way operating revenues of $71,551,375, and then it gives these total direct expenses they have here and they come out with the same 51.62 figure, and it looks to me like it is a figure that includes all of the total railway operating revenue, still isn't limited to freight.

Mr. Cummings: We can ask the witness.

By Mr. Cummings:

Q. The revised page does not include passenger costs?
A. It does not include passenger costs or revenues.

The Court: Or revenues. All right.

Mr. Cummings: If you are willing to accept the 42.33 percent figure, Mr. Highsaw, as the Judge suggested, as a compromise, we will go along.

Mr. Highsaw: I am willing to accept it as being the correct net figure for the year 1960. It is my position that it is *not the correct* figure for this month.

The Court: Well, it is accepted, as I understand, as the annual cost figure. That is the lower figure, but counsel for the defendant reserves the right to insist that the cost figure that should be utilized here is the cost figure for the particular month in question, namely May of 1960.

Does that accurately state your position?

Mr. Highsaw: That states it accurately.

The Court: All right.

Mr. Cummings: To resolve the dilemma then, Your Honor, we will substitute for the second page of Exhibit 3 the page which Mr. Highsaw was shown a few moments ago which does use the lower net as shown in the answer to the first set of answers to the interrogatories.

By Mr. Cummings:

Q. Now, using that page, Mr. Darnell, would you explain how the figures below the line were computed by you?
[fol. 138] A. These figures were taken from the annual

report to the stockholders and the total revenue for the year was divided into the expenses under these various categories to arrive at a ratio of these operating expenses to gross revenues, and these percents so determined of 57.67 percent for operating expenses including maintenance of way and structures, maintenance of equipment and transportation. 42.33 percent, as the balance, would be the net figure after those expenses were excluded.

Q. So that the costs of running these trains are in the three items, maintenance of way and structures, maintenance of equipment and transportation, isn't that so?

A. They are included in it.

Q. And you used the percentage figure 42.33 percent with reference to the $103,000 shown on the righthand column of page 2 in arriving at the figure of $43,839.67?

A. That's correct.

Mr. Cummings: That would have to be reduced, Your Honor, because as the previous witness testified if you delete the last few companies in accordance with your ruling the total should not be $103,000.

The Court: Well, shouldn't the answer then be 42.33 percent of $89,743.38?

The Witness: That's correct.

By Mr. Cummings:

Q. These figures you have used are the total actual cost of moving the freight in question, isn't that true, to the best of your ability?

A. That's the full cost.

Mr. Cummings: Yes. Mr. Highsaw.

Cross examination.

By Mr. Highsaw:

Q. Mr. Darnell, is it not a fact that these are direct costs, these items we are talking about here?

A. They include allocated costs.

Q. They include allocated costs. Isn't it a fact that these items of cost that we are talking about here—well, strike that. I should ask you what allocated costs are included in those figures?

A. Oh, maintenance of way and structures is principally allocated. Depreciation on road property is allocated. Depreciation on equipment is allocated. Direct costs would be crew wages and locomotive fuel and car repairs, things like that.

[fol. 139] Q. Now, isn't it a fact that in speaking of these items of cost that your costs in May are much higher, for example, these items, than in December?

A. I did not compare any figures. This could very well be. If the tonnage decreased and we were still operating the trains with lighter tonnage, then the costs would be greater, yes.

Q. Are you familiar with your 1960 financial figures?

A. No, only just what we took off the stockholders' report for this exhibit. That's all I am familiar with right now. I generally know.

Q. You don't have any figures for the month of May, 1960?

A. No, sir, not with me.

Q. And these figures were not included in your stockholders' report?

A. The May figures?

Q. Yes.

A. Oh, yes.

Q. The figures were given by the month? I mean, the figures for the stockholders included an entire year, is that correct?

A. Yes, it included the entire year. I don't believe there is figures in there month by month. I do not believe that's given to the stockholders.

Q. Do you have your May, 1960 stockholders' report here?

Mr. Barrows: I should have a copy. Evidently in my packing to come to court this morning I omitted it. I will bring you a copy, if you wish.

The Court: All right, would you bring it after lunch.

Mr. Highsaw: Could I ask that this witness be available then, after I have had a chance to look at it?

The Court: Yes.

Mr. Highsaw: Thank you, that's all.

OFFERS IN EVIDENCE

Mr. Cummings: Your Honor, at this time I would like to move the admission of the substituted second page of Exhibit 3, including the figures below the bottom line.

The Court: Those are the only parts of the exhibit that the Court will receive, in line with its previous ruling. In other words, lines 12 and 13 will not be received.

[fol. 140] I would like you to submit the remaining part of page 2. You might want that for your record. We will just attach it.

Mr. Highsaw: As I understand it, the document actually being offered has these corrections, line 15 and the figure on the net, have been made on the document itself.

The Court: Oh, I see, it has been. I see it has been now, but you may want the other figure for your record. That's what I had in mine.

Mr. Cummings: Good.

Mr. Highsaw: Well, I have no objection to the receipt of the document with the penciled-in corrections.

The Court: All right, thank you.

Mr. Cummings: At this time, I would also like to move the admission in evidence of Exhibits 1 and 2, which are in the Court file because they were presented at the pretrial before Judge Doyle.

Number 1 is the Trainmen's strike letter of May 16, 1960, and Number 2 is the Mediation Board Secretary Thompson's wire of April 19, 1960.

The Court: Do you have any objection?

Mr. Highsaw: No objection.

The Court: 1 and 2 will be received.

(Plaintiff's Exhibits 1 and 2 for identification were received in evidence.)

Mr. Cummings: And as a final exhibit we would like to offer in evidence the deposition that was taken of Mr. Speight, which has been marked for identification as Plaintiff's Exhibit 10, with the understanding that the Rio Grande is not claiming any damage for so-called loss of business from the General Electric Company.

I believe this was one of the depositions you said you were planning to offer in evidence, Mr. Highsaw.

[fol. 141] The Court: I have the deposition here.

Mr. Highsaw: Your Honor, I only have objections to certain lines. I have no objection to the general offer. I do have objection to certain specific lines in it, and I would like to record those objections at this time for your subsequent examination.

The Court: All right, Mr. Highsaw. If it would be more convenient, we could do this after lunch.

Mr. Highsaw: Yes, I think it might be better and will save Your Honor's time if I do this.

The Court: All right. Do you have any further testimony from Mr. Darnell?

Mr. Barrows: Yes, he will have to come back this afternoon.

The Court: Yes, I mean at this time.

Mr. Cummings: No.

The Court: All right, you may step down, Mr. Darnell, and you will return.

Do you have any witness you want to put on before lunch?

Mr. Cummings: No, there is no other witness. We will be asking Mr. Darnell a few questions after lunch.

The Court: All right, then we will recess until 1:30.

(Whereupon, the Court recessed at 11:50 o'clock a.m., and reconvened at 1:30 o'clock p.m.)

Mr. Barrows: Let the record show that I have furnished Mr. Highsaw a copy of the annual report of the Denver

and Rio Grande Western Railroad Company for the year 1960.

Mr. Highsaw: That's correct, Your Honor.

The Court: All right.

[fol. 142] Mr. Highsaw: Your Honor, I believe when we recessed at noon that I had just said that I had no objection to the admission in evidence of the Speight deposition except for certain specific portions thereof which I move be stricken.

The portions are as follows: Beginning with line 15 on page 8, running through line 7 on page 31, and I would move to strike that on the grounds that it is a discussion of shipments by General Electric Company, and I understand the claim with respect to General Electric Company is abandoned, so that would be irrelevant.

Mr. Cummings: That is true, Your Honor. We have abandoned any claims with respect to General Electric.

The Court: All right, the objection will be sustained as to that, commencing with line 15 on page 8 and ending with line 7, page 31.

Mr. Highsaw: And the next item, Your Honor, is on line 23 on page 37.

Mr. Cummings: Page 37, line 3?

Mr. Highsaw: Line 23, beginning on line 23.

Mr. Barrows: What page was that again?

Mr. Highsaw: 37, beginning with a question there and running down through line 22 on page 38, which is questions and answers with respect to Kennecott Copper Company, and I would move to strike that and not receive that portion of the deposition on the grounds that it constitutes hearsay evidence.

Mr. Cummings: From a casual reading of it, it looks like the information was furnished to Mr. Speight personally, and for the same reasons as this morning, Your Honor, we would wish that it be received.

Mr. Highsaw: Also—

The Court: Just a minute, I think I might as well rule.

[fol. 143] Mr. Highsaw: Yes, Your Honor, I just had one other point I wanted to make about it.

The Court: Well, the objection is sustained. In addition to the reason stated by Mr. Highsaw, I notice in the answers on page 38, starting with line 4, that is that's the question, and the answer, "In other words, this was just an estimate based upon statements made by Kennecott people, is that right, sir?" "Yes, sir." And further on down, "You really didn't make any investigation?" "Not at that time and not since." So, that's sustained.

Mr. Cummings: Where does your objection end?

The Court: Line 22.

Mr. Highsaw: Line 22, yes.

The Court: That's sustained.

Mr. Highsaw: Next point, Your Honor, is line 4 on page 42.

The Court: 42?

Mr. Highsaw: Yes.

The Court: Line 4, all right, sir.

Mr. Highsaw: And running down through line 21 on that page and that's a discussion of possible losses of shipments by the Rubberoid Corporation, and I believe if Your Honor will look at it, this man Hugh Hill appears earlier in the deposition and is one of the traffic representatives of the Denver and Rio Grande. He worked under Mr. Speight, and the substance is Mr. Hill talked with some Harrington people and Mr. Hill told Mr. Speight, who testified to it in the deposition. Our motion to strike that would be on the grounds it is double hearsay.

Mr. Cummings: Lines 18 to 21 seem to be based on Mr. Speight's personal knowledge.

The Court: Well, I don't agree, Mr. Cummings, because he says, "Not other than perhaps a conversation where they called in asking us about a strike. We gave them information we had." He is talking in general terms. He is not talking about what he personally did there.

[fol. 144] The objection to those lines, 4 through 21, on page 42 will be sustained.

Mr. Highsaw: Your Honor, I noticed I cut that a little short. That objection should have included over to line 9 on page 43. I misread it. I had previously made a mark. The portion I objected to ran over to line 9.

The Court: Yes. Well, the ruling will include through line 9 on page 43.

Mr. Highsaw: That's all, Your Honor. I have no objection to the rest.

The Court: All right.

A. L. DARNELL resumed the stand and further testified as follows:

Redirect examination.

By Mr. Cummings:

Q. Showing you Exhibit 3, at least parts of which are in evidence, comparing the figures on the bottom of the second page with the bottom of the third page, could you tell us what the difference is and what the basis of the difference is?

A. Well, the difference is 6.05 percent.

Q. What caused that difference?

A. Well, the reason that the—page 3 I believe you said was the last page, wasn't it?

Q. Yes.

A. That page decreased percentagewise is because that represents only freight expenses, while the previous page includes passenger train expenses. It includes all expenses, freight and passenger.

Q. I think you have it just the opposite.

A. That's right. It is the opposite. Page 3 includes freight and passenger expenses, while the preceding page includes only freight expenses.

Q. In your opinion, as a statistician for the railroad, which figures are more accurate to represent the situation?

A. The figure that excludes passenger expenses.

Mr. Cummings: That's all I have.

[fol. 145] Recross examination.

By Mr. Highsaw:

Q. Looking at page 32 of the document that has been furnished to me, Annual Report, 1960, Denver and Rio Grande Western Railroad Company, I would like for you, Mr. Darnell, to look at the line under May, 1960, under "Maintenance of Way and Structures", and read to the Court the amount given there.

A. The money?

Q. The money. Yes, the money.

A. May, 1960—

Mr. Cummings: Your Honor, should there be any reading from this until it is in evidence?

The Court: Well, are you going to offer it in evidence?

Mr. Highsaw: The whole book? I will if they want it.

The Court: Do you want it?

Mr. Cummings: If you are only going to have small portions read, that's fine.

Mr. Highsaw: Just three or four figures.

The Court: All right.

A. (Continued) May, 1960, Maintenance of Ways and Structures, $834,376.36.

Q. Now, the reason I didn't have you read the percentage figure there, it appeared to me that was a percentage figure in relation to total revenue and freight revenue.

A. That's true.

Q. All right, so we will not read the percentage figure. Then would you read the expense figure for May, 1960, Maintenance of Equipment?

A. $986,172.62.

Q. Okay, and would you read the one covering Transportation?

A. $2,043,493.58.

Q. And would you read into the record, sir, the figure of freight revenues for May, 1960?

A. $5,991,976.78.

Q. I notice that there is included in the operating expenses in this report a figure under "Traffic". What does that include ordinarily?

A. It is our traffic department solicitation, traffic solicitation, traffic management.

Q. Did you include that item in this figure we had here for the expenses of the railroad for the whole year 1960?

A. No, sir.

[fol. 146] Q. How much would that item come to? For the year 1960?

A. In the amount shown here, you mean?

Q. Yes, for the entire year.

A. Well, for the entire year, it came to $2,817,704.69.

Q. What was it for the month of May, 1960?

A. $236,945.14.

Q. Now, Mr. Darnell, in connection with all these figures you have been giving on the railroad's cost and savings during this period, did any savings in wages of employees not working result to the railroad during the strike on the day of May 16, 1960?

A. Not to my knowledge.

Q. You don't know of any such?

A. I don't know.

Q. Do you know whether or not employees did subsequently attempt to claim wages and these were denied?

A. I do not.

Mr. Highsaw: Thank you, sir, that's all.

Further redirect examination.

By Mr. Cummings:

Q. The items shown on the last page of Exhibit 3 reading, "Transportation, 32.14 percent", would, of course, include labor charges, would it not?

A. Includes labor, yes, sir, crew wages.

Q. So if there had been any savings in labor charges due to the strike, they would be reflected there?

A. Yes, they would be there.

Q. Now, if you applied the percentage that Mr. Highsaw thinks should be applied, namely including passenger business, for the month of May, 1960, what percentage would you come up with instead of 42.38 percent as shown on the third page of Exhibit 3?

Mr. Highsaw: I don't mind him giving the figure. I object to the form of the question. Passenger revenues. I don't think I have insisted.

Mr. Cummings: Well, you argued this morning they should be taken into account.

The Court: Well, I think the question should be without regard to Mr. Highsaw.

Mr. Cummings: Very well, let me strike that reference then.

The Court: All right.

[fol. 147] By Mr. Cummings:

Q. Including passengers, what percentage would you come up for May of 1960?

A. 60.45 percent, and the balance over and above that, of course, would be 39.55.

Q. So, the balance instead of 42.33 percent would be 39.55 percent, is that true?

A. That's what it works out to, yes, sir.

Q. And the total would be 60.45 percent instead of 57.67 percent?

A. That's right.

Further cross examination.

By Mr. Highsaw:

Q. And that leaves out of account the traffic item which you and I just covered, is that correct?

A. Yes, sir.

The Court: Would the 39.55 be in place of 42.33? Is that right?

Mr. Cummings: I couldn't hear the question.

The Court: I probably better direct it to the witness. Would the 39.55—

The Witness: That would be in place of the 42.33, yes, sir.

The Court: All right, I just wanted to understand it. Now, I would like to ask this witness another question. Why isn't the traffic expense which was read into the record figured in the overall expense?

The Witness: Because it is not variable with traffic. It is a sort of a fixed expense. It levels off throughout the year. If we lose 100 cars of freight, our traffic department expense is not going to decrease.

Further redirect examination.

By Mr. Cummings:

Q. In other words, it is your position, is it not, that all the carrier saved during this strike was the cost of transporting the cars in question?

A. The cost of transporting the cars in question.

The Court: Well, I just wanted to know. Thank you.

[fol. 148] By Mr. Cummings:

Q. Speaking of May, 1960, would the maintenance of way figure be higher in that month than throughout the year?

A. It tends to creep up that time of year because the weather conditions permit the work on track and maintenance of track and maintenance of way and structures.

Q. In order to get an overall picture without reflecting seasonal changes, that is why you chose the whole year instead of the month of May?

A. Yes, sir.

The Court: Anything further?

Mr. Highsaw: That's all the questions I have.

The Court: You are excused, Mr. Darnell.

Mr. Cummings: There was one topic I neglected to cover with Mr. Burnaugh after looking at my notes, so with Your Honor's indulgence I would like to recall him to the stand.

The Court: Yes, you may.

Mr. Cummings: Mr. Burnaugh.

H. F. BURNAUGH having been previously sworn, called as a witness by the plaintiff, resumed the stand and further testified as follows:

Direct examination.

By Mr. Cummings:

Q. In connection with your duties at the traffic department of the Denver and Rio Grande, Mr. Burnaugh, have you had occasion to learn shippers' attitude about preliminary injunctions?

Mr. Highsaw: I object to that question, Your Honor.

By Mr. Cummings:

Q. Have you had any conversations with any shippers—I withdraw the question.

The Court: All right.

By Mr. Cummings:

Q. Have you had any conversation with shippers in which you were told that the shippers would insist on preliminary injunctions before dealing with you?

[fol. 149] Mr. Highsaw: Your Honor, I object on the grounds that the Ford Motor Company, which is the one

shipper that has been here and testified, and my recollection is that Mr. Crawford testified very specifically on this as far as Ford, and that's one basis of objection, and, secondly, this is hearsay evidence.

The Court: Is your question limited to this particular strike that we are concerned with here?

Mr. Cummings: Yes.

The Court: The objection is overruled. You may answer the question.

A. Only in the case of Ford Motor Company was I questioned about the temporary restraining order and which apparently they were not familiar compared to an injunction.

Q. During the course of your conversations with Ford, did you or did you not learn that they preferred a preliminary injunction to a temporary restraining order?

Mr. Highsaw: Your Honor, I object on the grounds that was testified to by Mr. Crawford.

The Court: Objection sustained.

Mr. Cummings: Your Honor, apparently Mr. Highsaw takes the position that a temporary restraining order should have been enough to satisfy shippers and I would like to elicit from this witness that shippers instead insist on preliminary injunctions, so I would like at least to offer proof to this effect.

The Court: Well, it seems to me the best evidence to this as far as the Ford Motor Company is concerned is the evidence that Mr. Crawford gave, and as I understood his testimony, the reason that they diverted this traffic was not only the question of preliminary injunction but it was the threat of a strike, and they made a judgment based on I suppose past experience and their business knowledge that it would be prudent to divert this, and so I can't see, unless you can tie it down to some individual at Ford Motor Company—I don't think it is proper testimony to just say that the Ford Motor Company, somebody there, said this, because there is no way to meet that kind of statement.

[fol. 150] By Mr. Cummings:

Q. Very well, was there an individual at Ford Motor Company that told you preliminary injunctions were preferred by Ford?

A. Yes, Dan McCown told me that in my discussion with him and we were deprived of the business until we received an injunction—

Mr. Highsaw: I object to that last part of the answer.

The Court: The last part of the answer will be stricken from the record. It is not responsive to the question and is voluntary.

Mr. Cummings: That's all I have.

Cross examination.

By Mr. Highsaw:

Q. Just for the record, Mr. McCown is the manager of the Ford Motor Company plant at—

A. Milpitas, California.

Mr. Highsaw: Thank you, sir.

The Court: All right, you may step down, Mr. Burnaugh. Thank you.

Mr. Cummings: Because of the argument that was made concerning the answers to interrogatories, three sets of interrogatories that the Rio Grande furnished to the Brotherhood of Railroad Trainmen in this case, I would like them to be marked as a Collective Exhibit 11, and offer them in evidence, Your Honor.

Mr. Highsaw: I think you ought to offer in evidence only the portions I referred to. I didn't cover the entire interrogatories, and I think we ought to offer in evidence only the specific questions and the answers to those specific questions.

Mr. Cummings: Well, I would like to offer the complete answers.

Mr. Highsaw: Because the rest of it is a certain amount of self-serving declarations, Your Honor, on other matters.

The Court: Well, I presume we will just have to screen them, gentlemen, so get your interrogatories out.

[fol. 151] Mr. Highsaw: Well, I referred, Your Honor, to Questions 20, 21—

Mr. Cummings: Rather than delay the proceedings further, we will accept Mr. Highsaw's suggestion and limit it to that portion which he referred to.

Mr. Highsaw: I referred to Questions 20, 21 and 22 of the original, first interrogatories of the Brotherhood and the answers thereto.

The Court: Well, just a moment, gentlemen, so that I may be able to follow you. You gentlemen are much more familiar with the pleadings in this case than I.

Mr. Cummings: That's the portion of the answers where the carrier first gave this percentage.

The Court: Well, I want to get the proper answers here. We have several right in a row. I have answers filed June 22nd. Are we referring to those?

Mr. Highsaw: Yes, that was the third set of interrogatories, and part of it does refer to those, Your Honor. I will get that out in just a minute.

The Court: Are those the ones we are concerned with?

Mr. Highsaw: We are concerned about two, and that is one of them. Now, we are concerned there about the ones that were filed on June 22 with the answers to Questions 12 through 20 and Questions 12 through 20.

The Court: All right, 12 through 20 then of the questions and answers to the third set of interrogatories submitted by the defendant to plaintiff will be received in evidence, the answers being those filed June 22, 1964, in this Court.

Mr. Highsaw: And the other reference that I made, Your Honor, was to the first set of interrogatories which were answered by the plaintiff on January 27, 1964.

The Court: I have some filed here, plaintiff's answers to defendant's interrogatories, filed February 14th.

[fol. 152] Mr. Highsaw: That's undoubtedly the correct ones.

Mr. Cummings: Is the first answer, Your Honor, "Messrs. Carroll and McDonald"?

The Court: Yes.

Mr. Cummings: That's the set, and the exhibit there.

Mr. Highsaw: That's right, Exhibit A. That would be Questions 20, 21 and 22, and the attached Exhibit A, and, of course, the corresponding questions.

The Court: All right, the questions, 20, 21 and 22, submitted by the defendant to plaintiff and plaintiff's answers to those, together with Exhibit A, filed on February 14, 1964, will be received in evidence.

Mr. Cummings: As I recall the argument, Your Honor, this morning, and I may be wrong, there was no reference to the plaintiff's third set of answers.

Mr. Highsaw: No, that is not correct. I started out and I was covering—I covered this and then I had just started in to refer to the annual reports and there was then a colloquy with the Court and I mentioned this third set, but that was what—the third set basically was what it was based on, and we had to start out with the first set in order to understand it.

The Court: Are there any other of the interrogatories you want to offer?

Mr. Cummings: We have nothing further, Your Honor.

The Court: All right, then the plaintiff rests.

Mr. Highsaw: I would like, for the defendant, Your Honor, to ask the plaintiff to stipulate to the questions and answers in Paragraphs 6, 7, 12 and 13 of the original interrogatories that defendant served on the plaintiff and were answered on February 14, 1964.

Mr. Cummings: That's agreeable.

[fol. 153] The Court: All right.

Mr. Highsaw: Secondly, I would like to ask the plaintiff to stipulate into the record a document which I will offer to be identified as exhibits, which are wage claims filed by employees of the Denver and Rio Grande on May

16, 1960, and some of these claims are granted and some denied.

I am offering them for the purpose of showing that the railroad did not pay all its employees on May 16, 1960.

Mr. Cummings: We are not sure that's a complete set, but we will certainly stipulate that some of the claims were denied and some were paid.

Mr. Highsaw: If they will stipulate that, I don't think there is any necessity of putting the actual physical pieces of paper in.

The Court: Now, that's for May 16th?

Mr. Cummings: Yes.

The Court: It certainly wasn't for all the employees of the railroad.

Mr. Cummings: Just the third shift.

Mr. Highsaw: That's right, just during the actual time the strike was going on.

Mr. Cummings: And only employees represented by Mr. Highsaw.

Mr. Barrows: These are switchmen?

Mr. Highsaw: Yes.

Mr. Barrows: Now, how many switchmen claims do you have there, Mr. Highsaw?

Mr. Highsaw: Let's see, I have— (Counting). Assuming I counted correctly, Mr. Barrows, I have 42.

[fol. 154] Mr. Barrows: How many were paid, do you know?

Mr. Highsaw: Yes, I can tell you that, just a moment. If I counted correctly, Mr. Barrows, these are the ones that were sustained, and they come to 22.

Mr. Barrows: 22 out of 42?

Mr. Highsaw: That's right.

The Court: Do you want to cross-examine him, Mr. Barrows?

Mr. Barrows: I don't really see the materiality of switchmen.

Mr. Highsaw: I will state to the Court the purpose of this. The purpose of this, Your Honor, is that it is our

position that the burden of proof is on the plaintiff in this case to show what its net loss was, and it is obvious from these claims alone that there were employees on the railroad who were not paid during this time.

Now, ordinarily, one would assume that when people were not working they wouldn't be paid. We tried to get this through interrogatories and the carrier said they didn't have the information to furnish it to us, and I think Mr. Cummings will agree with me that the line drawn sustaining these claims was that where the carrier called a man for work during this period of time they had to pay him whether he worked or not, but if he was just around on his own or on the picket line he was not paid during this period of time, so it is our position that having shown that there were people who didn't get paid it is a burden of proof on the carrier to show exactly what this amounted to and otherwise they haven't sustained their burden of proof.

Mr. Cummings: We think they are insignificant because Mr. Darnell said his figures did take into account the differences in labor charges because of the strike, but I am certainly not going to quarrel with Mr. Highsaw that those are the actual statistics on the switchmen's claims, and we will stipulate to that effect.

[fol. 155] Mr. Highsaw: I think that concludes our presentation.

The Court: All right, defendant rests. I presume there will be no rebuttal?

Mr. Cummings: No.

The Court: Do you gentlemen want to argue it or submit it without argument?

Mr. Highsaw: I think both Mr. Cummings and I are just a little weary. We were discussing it at noon. If it is all right, I would like about the 20 days provided in the other case to submit maybe a short supplemental brief after I have looked over all these figures and perhaps some proposed findings.

Mr. Cummings: If we could have 15 days to reply, that ought to be satisfactory, Your Honor.

The Court: All right, and will you prepare proposed findings, Mr. Cummings?

Mr. Cummings: Surely. The main point we want to brief, and the only point we see that might be briefed is our position that this being a tort case they are not entitled to set off any subsequent recoveries we have made from third parties.

The Court: There is another matter I think we might iron out here and now. The case is against the Brotherhood of Railroad Trainmen and certain named individuals.

Now, with the exception of Mr. Carroll, I haven't heard any testimony about these other individuals.

Mr. Cummings: That was briefed before Judge Phillips, Your Honor, and—

Mr. Highsaw: The question that was briefed before Judge Phillips, Your Honor, was whether or not having named these people in the complaint they had properly stated a class action, but now we have had in evidence and the record is closed on the question of the strike and I agree with you there is no evidence at all that anyone had anything to do with this strike other than the Brotherhood and Mr. Carroll, and when I send in my supplemental brief [fol. 156] that is one point I would make, is that the complaint should be dismissed as to all other defendants.

Mr. Cummings: The same point was made to Judge Phillips, but we will be glad to put that on my brief, too.

The Court: I am not making a judgment or ruling on it. This is just a matter—

Mr. Cummings: The cases we submitted to Judge Phillips hold it is proper to add individual employees as a means of enforcing judgments against unions, but I will put those in our brief.

The Court: All right, now I will see if there is anything else I need.

Apparently we are not going to argue this, so I will ask counsel to meet with my Clerk after I recess and satisfy

yourselves that the exhibits that have been offered are all here and not in your brief cases, inadvertently, of course.

There was a question in my mind about this Exhibit 3.

Mr. Cummings: It is the third page that Your Honor admitted into evidence this morning instead of the second page.

The Court: Well, now, does the third page take into consideration the 62 carloads that were shipped from California east?

Mr. Cummings: Yes, even the first page does, because Mr. McCown's deposition, which is in evidence—

The Court: Yes, I know what the testimony is now since the deposition is in, but I wasn't sure that the figures included that.

Mr. Highsaw: Yes, it does, Your Honor.

Mr. Cummings: Yes.

The Court: All right. Well, do either counsel have anything further then that they want to raise at this time?

[fol. 157] All right, then we will consider the matter submitted. As I understand it, the defendant wants 20 days in which to supplement his trial memorandum and submit proposed findings, and the plaintiff will have 15 days thereafter to submit his reply brief or answer brief.

All right, Mr. Carpenter, if you will take these and then counsel will go over them with you there and see that we have everything we should have.

Court is in recess.

(Whereupon, the hearing was adjourned.)

Filed April 20, 1965.

PLAINTIFF'S EXHIBIT 1

Copy

720 Kittredge Building
Denver 2, Colorado
May 16, 1960

Mr. L. H. Hale, Vice President-General Manager
Denver and Rio Grande Western Railroad Company
1531 Stout Street
Denver 2, Colorado

Dear Sir: Referring to exchange of correspondence between the undersigned and Director of Personnel E. B. Herdman relative to Carrier's refusal to make effective Orders issued by the First Division of the National Railroad Adjustment Board, in connection with their Awards 19 372 and 19 389.

In view of the Carrier's refusal to make effective the Orders of the Board in the above Awards, a legal strike of brakemen on the property was set for 2:30 P.M., April 15, 1960. However, the National Mediation Board assumed jurisdiction in the matter April 13 and the strike was postponed pending mediation proceedings.

The Mediation Board advises this date that their mediation efforts having failed the Board has closed its file on Case E-226. Therefore, you are hereby advised that the strike of brakemen is reset for 2:00 P.M., May 16, 1960, involving the following matters:

[fol. 158]

1. Carrier's refusal to comply with Order of the National Railroad Adjustment Board, First Division, to make effective Award 19 372 with respect to payment of money due employees.

2. Carrier's refusal to comply with Order of the National Railroad Adjustment Board, First Division, to make effective Award 19 389 with respect to payment of money due employees.

3. Carrier's refusal to comply with Order of the National Railroad Adjustment Board, First Division, to make effective Award 19 372 with respect to reestablishing the tabulated Provo-Eureka run as per the Findings and Award.

Yours truly,

(sgd) R. H. McDONALD
R. H. McDonald
Vice President, BofRT

(sgd) R. E. CARROLL
R. E. Carroll, General
Chairman BofRT

cc: Mr. W. P. Kennedy
National Mediation Board

Copy PLAINTIFF'S EXHIBIT 2

S WA028 DL AR-FAX Washington DC 12 1019 AME

E B Herdman, DIR PERS The Denver And Rio Grande Western Railroad CO DVR;

Following Wire Received From President Kennedy of BRT "Account Failure Management D&RGW Railroad To Apply NRAB First Division Awards 19372 and 19389 Have Authorized The Men We Represent That Property Withdrawn From Service 2:30 PM Mountain Standard Time April 15 1960." Please Wire Statement—

E. C. Thompson Exec Secy NMB—9:24A

D&RGW NRAB 19372 19389 2:30 PM 15 1960.

[fol. 158-A] Clerk's Certificate (omitted in printing).

[fol. 159]

OPINION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT.

JULY TERM—1966

No. 8196

BROTHERHOOD OF RAILROAD TRAINMEN and R. E. CARROLL, Appellants,

v.

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Appellee.

Appeal From the United States District Court for the District of Colorado

---

OPINION—September 21, 1966

James L. Highsaw, Jr. (Philip Hornbein, Jr., Hornbein & Hornbein, and Mulholland, Hickey & Lyman on the brief) for Appellants.

Martin Lucente (Ernest Porter, Kenneth D. Barrows, Walter J. Cummings, Jr., Richard H. Compere, and Sidley, Austin, Burgess & Smith on the brief) for Appellee.

Before Murrah, Chief Judge, Pickett and Lewis, Circuit Judges.

Pickett, Circuit Judge.

[fol. 160] Seeking damages alleged to have resulted from an unlawful strike, the Denver & Rio Grande Western Rail-

[File endorsement omitted]

road Company, a Delaware corporation with its principal place of business in Denver, Colorado, brought this tort action against the Brotherhood of Railroad Trainmen,[1] the chairmen of the Brotherhood of Railroad Trainmen locals in Colorado, and R. E. Carroll, representing the Brotherhood on the Rio Grande as Chairman of the General Grievance Committee. The trial court overruled the Brotherhood's motion to dismiss, which included an allegation that venue of the action did not lie in the United States District Court for the District of Colorado. Following a trial, the local chairmen were dismissed from the action, and judgment in the sum of $37,988.37 was entered against the Brotherhood and Carroll. This appeal followed.

The National Railroad Adjustment Board made two awards for the payment of money to the Brotherhood, which the Railroad refused to pay. On May 16, 1960, at 2:00 P.M., a strike was called on the property of the Rio Grande for the purpose of compelling payment of the awards. At about 6:30 P.M. on the same day, a temporary restraining order enjoining continuance of the strike was served upon Carroll. A few hours later the strike was discontinued over [fol. 161] the entire system and never renewed. Thereafter, holding the strike to be illegal, the district court issued a preliminary injunction which became permanent on July 27, 1960. (185 F.Supp. 369, aff'd 294 F.2d 266). Meanwhile, believing that a strike threat still existed, several shippers, principally Ford and its suppliers, between May 19th and June 1, 1960, diverted freight shipments from Rio Grande lines. It is for the loss of revenue caused by these diversions that the district court allowed recovery.

At the outset, we are confronted with the contention that venue of the action does not lie in the United States District Court for the District of Colorado. The venue statute, 28 U.S.C. §1391(b), states:

---

[1] The Brotherhood was the duly certified representative under the Railway Labor Act of certain employees of the Rio Grande, and at all times during this controversy there was in effect a collective bargaining agreement.

> "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

Venue here depends upon whether the Brotherhood is held to reside within the judicial district of Colorado, or in Cleveland, Ohio, where its headquarters and principal place of business is located. Section 1391 (c) provides:

> "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and shall be regarded as the residence of such corporation for venue purposes."

Relying upon Rutland Ry. Corp. v. B. of R. T., 2 Cir., 307 F.2d 21, and like authorities holding that incorporated associations, including unincorporated national labor [fol. 162] unions, should be treated as corporations,[2] the district court upheld venue. Subsequent to the entry of judgment, the Supreme Court, in Steelworkers v. Bouligny, Inc., 382 U.S. 145, while recognizing the validity of the reasoning in cases like Rutland, held that an unincorporated labor union was not yet in the same category as a corporation, and that if such unions were to be treated as corporations, the change should be made by Congress and not by judicial determination. Although the court in the Bouligny case was discussing the diversity statute, the holding was clearly to the effect that unincorporated associations were basically different from corporations. It was a rejection of the principle espoused by the Rutland case, upon which the Rio Grande relies to sustain venue. For

[2] The rule is stated in the Rutland case as follows: "Since the residence of a corporation for venue purposes has been expanded to include all the judicial districts in which the corporation is doing business, the residence of an unincorporated association for venue purposes should likewise be expanded to include all the judicial districts in which the unincorporated entity is doing business."

venue purposes, the Brotherhood is not a resident of Colorado as required by §1391(b), and consequently, the complaint must be dismissed.

The Railroad suggests that even if venue did not exist as to the Brotherhood, the proper procedure would be to drop it from the case and let the judgment stand against Carroll, a Colorado resident. Carroll was Chairman of the General Grievance Committee on the Rio Grande; he was not an officer of the union. So far as the record shows, [fol. 163] Carroll's role in connection with the strike was limited to sending the Railroad notice of the Brotherhood's strike decision and thereafter advising the local unions of the issuance of the restraining order. Carroll had no more to do with causing the strike than did the chairmen of the locals, and accordingly, he too should have been dismissed from the action.[3]

Reversed.

[fol. 164]

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JUDGMENT—September 21, 1966

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

---

[3] The trial court found only that Carroll was "General Chairman of the General Grievance Committee of the Brotherhood on the property of the plaintiff" and that he notified the local groups to call off the strike after service of the temporary restraining order.

On consideration whereof, it is ordered by this court that the judgment of the said district court in this cause be and the same is hereby reversed, that this cause be and the same is hereby remanded to the said district court for further proceedings in accordance with the views expressed in the opinion of the court, and that Brotherhood of Railroad Trainmen and R. E. Carroll appellants, have and recover of and from Denver and Rio Grande Western Railroad Company, appellee, their costs herein and have execution therefor.

[fol. 165]

IN THE UNITED STATES COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—
October 24, 1966

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the petition of appellee for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

[fol. 166] Clerk's Certificate (omitted in printing).

[fol. 167]

SUPREME COURT OF THE UNITED STATES

No. 794, October Term, 1966

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Petitioner,

v.

BROTHERHOOD OF RAILROAD TRAINMEN, et al.

ORDER ALLOWING CERTIORARI—January 9, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 794

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF RAILROAD TRAINMEN and R. E. CARROLL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF RAILROAD TRAINMEN and R. E. CARROLL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Denver and Rio Grande Western Railroad Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on September 21, 1966.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law and the Order of Judgment of the District Court, which were not officially reported, appear at pages 77-82 of the record. The opinion of the Court of Appeals (Appendix A, *infra*) has not yet been officially reported.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on September 21, 1966, and is appended hereto as Appendix A. The petition of the Denver and Rio Grande Western Railroad Company for rehearing was denied on October 24, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. In an action to recover damages for an unlawful strike, is venue proper as to the defendant labor union, an unincorporated association, in the judicial district where the defendant labor union is doing business and in which the unlawful strike occurred; or can the action be brought only in another judicial district, some thirteen hundred miles away, merely because the defendant labor union maintains its principal office in the latter judicial district?

2. Was the decision of this Court in *Steelworkers* v. *Bouligny*, 382 U.S. 145 (1965) on a question of diversity jurisdiction intended, as the Court below concluded, to overrule the Second Circuit's decision in *Rutland Railway Corporation* v. *Brotherhood of Locomotive Engineers*, 307 F. 2d 21 (2d Cir. 1962), cert. denied 372 U.S. 974, and other federal decisions holding that an unincorporated association is a resident for venue purposes of the judicial districts in which it is doing business?

3. Was it consistent or permissible for the Court below, having purportedly ruled on the basis of *Steelworkers* v. *Bouligny*, 382 U.S. 145 (1965), to conclude that venue can and must be laid at the unincorporated association's principal place of business, i.e., Cleveland, Ohio?

4. Where the General Chairman of a defendant labor union participates in the authorization, institution and conduct of an unlawful strike, may the Court of Appeals

set aside the judgment of the District Court holding the General Chairman responsible, along with the union, for the damages accruing from such a strike?

STATUTE INVOLVED

The statutory provisions involved are § 1391 of Title 28, United States Code and Rule 52(a) of the Federal Rules of Civil Procedure. They are printed in Appendix B hereto.

STATEMENT

This action was brought by the Denver and Rio Grande Western Railroad Company ("Rio Grande") against the Brotherhood of Railroad Trainmen ("Brotherhood"), certain officers of the Brotherhood, and members of the Brotherhood employed by the Rio Grande. The suit sought to recover damages resulting from a strike by the Brotherhood against the Rio Grande in violation of the provisions of the Railway Labor Act (45 U.S.C. § 151 *et seq.*). The Rio Grande is a corporation organized under the laws of the State of Delaware. It owns and operates a railroad system extending from Denver, Colorado Springs and Pueblo, Colorado, to Salt Lake City and Ogden, Utah, with numerous branches on those lines. Its principal place of business is in Denver, Colorado, and 63 per cent of its line of road is situated in Colorado (R. 68, 73).

The Brotherhood of Railroad Trainmen, an unincorporated association which holds representation rights on most of the railroads in the United States,[1] consists of a Grand

[1] The Thirty-first Annual Report of the National Mediation Board, for the fiscal year ended June 30, 1965, shows that the Brotherhood represents one or more classes or crafts of railroad employees on 91 railroads. This data is limited to "selected rail carriers" and thus does not reflect fully the extent of the Brotherhood's representation rights. (Thirty-First Annual Report of National Mediation Board for the fiscal year ended June 30, 1965, pp. 78-86.)

Lodge with headquarters at Cleveland, Ohio, and subordinate lodges located on the lines of such railroads (R. 7, 68). The Brotherhood is the designated representative of trainmen employed by the Rio Grande. As provided in the Brotherhood's Constitution and General Rules, the local lodges on each railroad elect a General Grievance Committee and a General Chairman thereof, for the purpose of performing the Brotherhood's representation functions under the Railway Labor Act (R. 5, 6). On the Rio Grande, R. E. Carroll was the General Chairman at the time of the strike involved in this litigation and at the time of the proceedings in the lower courts. Mr. Carroll maintains his headquarters at Denver, Colorado (R. 5-7, 10, 68-69, 92).

In accordance with the authority vested in him by the provisions of the Constitution and General Rules of the Brotherhood of Railroad Trainmen, General Chairman Carroll submitted certain claims to the First Division of the National Railroad Adjustment Board on behalf of employees of the Rio Grande, based on alleged violations of the collective bargaining agreement between the Rio Grande and the Brotherhood (R. 78). Subsequently, the National Railroad Adjustment Board issued awards 19372 and 19389 sustaining the claims (R. 78). The Board awarded a full day's pay to each claimant for each occasion on which it found a violation of the agreement, despite the fact that the claimants had suffered no monetary loss. Because it was convinced that the payments called for by the awards were arbitrary and unreasonable, the Rio Grande declined to comply with the awards.[1] In such

[1] In the enforcement actions instituted after the strike in question was found to be unlawful, the courts held that nominal damages, rather than a full day's pay, was the proper measure or damages since the employees involved had not suffered any monetary loss as as a result of the claimed violations of the agreement. *Brotherhood of Railroad Trainmen* v. *Denver & Rio Grande Western R. Co.*, 338 F. 2d 407 (10th Cir., 1964), cert. denied, 380 U.S. 972.

circumstances, an enforcement action is authorized by Section 3, First(p) of the Railway Labor Act. The Brotherhood, however, chose to attempt to compel the Rio Grande to comply with the awards by calling a strike.

On May 16, 1960, representatives of the Brotherhood advised the Rio Grande that the Brotherhood would call a strike on that day to compel the Rio Grande to make the payments called for by the awards (R. 157-158). The strike commenced and lasted until some hours after the United States District Court for the District of Colorado issued a temporary restraining order (R. 20, 93-94). The District Court and the Court of Appeals ultimately held the strike to have been in violation of the Railway Labor Act (45 U.S.C. § 151 *et seq.*). See *Denver & Rio Grande Western R. Co.* v. *Brotherhood of Railway Trainmen,* 185 F. Supp. 369 (D. Colo., 1960), affirmed, 290 F.2d 266 (10th Cir. 1961), certiorari denied, 366 U.S. 966. This action was subsequently brought in the United States District Court for the District of Colorado to recover damages accruing from diversions of freight to other railroads as a result of the unlawful strike.

Prior to the trial the Brotherhood moved to dismiss the complaint on the grounds, among others, that venue was improper (R. 9). This motion was denied by the District Court on August 29, 1963 (R. 11). The District Court, after a full trial on the merits, concluded that it had jurisdiction of the parties and subject matter under 28 U.S.C. §§ 1331 and 1337, and awarded the Rio Grande a judgment of $37,988.37 against the respondents, having found that because of the strike threat 274 carloads of freight had been diverted from the Rio Grande (R. 79-81).

The Brotherhood appealed from the judgment entered by the District Court. The Court of Appeals reversed the District Court, holding that *Steelworkers* v. *Bouligny, Inc.,*

382 U.S. 145, constituted "a rejection of the principle espoused by the Rutland case", and that venue (1) did not properly lie against an unincorporated association where it did business but (2) was proper only at its principal place of business, which was Cleveland, Ohio. The Court of Appeals also held that the record did not show that R. E. Carroll, the General Chairman of the Grievance Committee on the Rio Grande, had any responsibility for the illegal strike.

REASONS FOR GRANTING WRIT

(1) The Court of Appeals erred in treating this Court's opinion in *Steelworkers* v. *Bouligny, Inc.*, 382 U.S. 145, as a rejection of the venue principles established by prior decisions of the federal courts.

The issue of proper venue, raised by motion before trial in the District Court, was decided by Senior Circuit Judge Phillips (R. 11). Relying on *Rutland Railway Company* v. *Brotherhood of Locomotive Engineers*, 307 F. 2d 21 (2d Cir. 1962), which is reproduced as Appendix C hereto, the District Court held that the Brotherhood was doing business in Colorado and consequently was a resident of Colorado for venue purposes. The Court of Appeals concluded that (1) this Court's opinion in *Steelworkers* v. *Bouligny*, 382 U.S. 145, was "a rejection of the principle espoused by the *Rutland* case" and (2) that venue as to the Brotherhood would thus be proper only at its principal place of business, i.e., Cleveland, Ohio. (Appendix A *infra*, p. 29.)

In the *Steelworkers* case, however, this Court was not concerned with venue questions and did not discuss or cite any cases dealing with venue principles. The issue presented to this Court in the *Steelworkers* case, as this Court stated it, was "whether an unincorporated labor union is to be treated as a citizen for purposes of federal diversity

jurisdiction, without regard to the citizenship of its members" (382 U.S. 145, 147). The lower court had held that for diversity purposes, the citizenship of an unincorporated association is that of each of its members. This Court affirmed, rejecting the argument that an unincorporated association should be considered an entity and a citizen of the state in which it maintained its principal place of business. In reaching this result, this Court emphasized the fact that if an unincorporated association were treated as a jural entity for diversity purposes with its citizenship determined as if it were a corporation, a considerable expansion of the diversity jurisdiction of federal courts would inevitably follow. This Court, holding that only Congress under Article III of the Constitution can extend the jurisdiction of federal courts, decided that such "pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts" (Id. at 150-151). In the present case, jurisdiction is based on alleged violations of a federal statute and the venue question thus does not involve an expansion or contraction of federal court jurisdiction.

The holding of this Court in the *Steelworkers* case, that the citizenship of each individual member of an unincorporated association governs for diversity purposes has long been recognized. *Chapman* v. *Barney*, 129 U.S. 677. In the *Steelworkers* case, this Court was thus adhering to a long established principle applicable to unincorporated associations. The federal courts, however, have distinguished between the principles applicable when determining the citizenship of an unincorporated association for diversity jurisdiction and those relevant to a determination of the inhabitancy or residence of an unincorporated association for venue purposes. These different principles have coexisted and there is nothing about the *Steelworkers* case which indicates any intent to change that situation.

Insofar as venue problems are concerned, *Sperry Products* v. *Ass'n of American Railroads*, 132 F.2d 408 (2d Cir. 1942) cert. denied 319 U.S. 744, initiated the approach followed by the District Court in the present case. The court in *Sperry Products* was concerned with the inhabitancy of an unincorporated association under a venue statute applicable to patent litigation. Judge Learned Hand approached the problem by referring to the principles controlling such an issue for purposes of jurisdiction, stating:

> ". . . [I]n the matter of jurisdiction over the subject matter, an unincorporated association is disregarded: when for example jurisdiction depends upon diversity of citizenship, it is the citizenship of the members alone which counts. Levering & Garrigues Co. v. Morrin, 2 Cir., 61 F.2d 115. Thus, for most purposes the law still looks at such associations as mere aggregations of individuals." (pp. 410-11.)

Judge Hand held, however, that different principles should determine the venue question before him, stating:

> "Since, however, for the purpose of suit it [United Mine Workers v. Coronado Coal Co., 259 U.S. 344; Rule 17(b) of Federal Rules of Civil Procedure] has come to regard them as jural entities, we can see no reason why that doctrine should not be applied consistently to other procedural incidents than service of process, and venue is one of such incidents. Certainly that promotes simplicity, and simplicity was one of the conveniences which induced the original change. Therefore in construing § 48 Jud. Code, 28 U.S.C.A. § 109, in its application to an unincorporated association it seems inevitable that we should attribute an 'inhabitancy' to it as though it were a single jural person and not an aggregate." (p. 411.)

Having thus emphasized that different principles apply in determining inhabitancy of an unincorporated association for venue purposes as contrasted with determination

of citizenship for jurisdictional purposes, Judge Hand went on to hold that an unincorporated association should be assimilated to a corporation in order to determine its inhabitancy for venue purposes. Following this approach, the unincorporated association was held to be an inhabitant of the judicial district in which it maintained its principal place of business.

Although Judge Hand's decision involved the venue provisions of statutes relating to patent infringement actions, federal courts applied his reasoning to the determination of questions arising under the general venue statute. Prior to 1948 the general venue statute (28 U.S.C. § 112 (1940)) provided that "no civil suit shall be brought in any district court against any person . . . in any other district than that whereof he is an inhabitant." Accordingly Judge Hand's discussion of the requirements of the patent statute was equally relevant to the general venue requirements.

The venue provisions of the United States Code were amended in 1948. Paragraph (b) of § 1391, as amended, merely rephrased the prior law. Paragraph (c), however, extended venue over corporations from the state of incorporation, to any judicial district in which licensed to do business or doing business. Under paragraph (c) all of these locations are regarded as the residence of the corporation. (See Appendix B, p. 28.)

In *Rutland Railway Corporation* v. *Brotherhood of Locomotive Engineers,* 307 F.2d 21 (2d Cir. 1962), certiorari denied, 372 U.S. 954, the court, following Judge Hand's opinion in the *Sperry* case in light of § 1391(c), held that the residence of unincorporated associations should be assimilated to the residence of corporations, stating (at pp. 29-30, Appendix C, p. 41.)

> "Since the residence of a corporation for venue purposes has been expanded to include all the judicial dis-

tricts in which the corporation is doing business, the residence of an unincorporated association for venue purposes should likewise be expanded to include all the judicial districts in which the unincorporated entity is doing business. We believe this accords with the practical requirements of litigation involving unincorporated associations. If an unincorporated union is carrying on sufficient activities in a particular judicial district so that it is deemed to be doing business there, it usually will suffer no undue hardship if required to stand suit there. If in certain instances the defense of a suit in a particular district is peculiarly oppressive, the association may always seek a transfer of the action under 28 U.S.C. § 1404(a) (1958)."

In reaching this result the Court of Appeals for the Second Circuit was careful to note that "Venue in the federal courts is not a jurisdictional concept." (307 F.2d 21, 29, Appendix C, p. 40.)

Thus the essential issue presented to the Court in the *Rutland* case was whether or not the process initiated by Judge Hand in the *Sperry Products* case should be continued by applying to unincorporated associations the corporate venue requirement of the Judicial Code as amended in 1948, just as Judge Hand had applied such requirements to unincorporated associations prior to the 1948 amendments. As stated, the issue before this Court in the *Steelworkers* case did not involve any such question. This Court did not cite nor purport to disapprove of cases such as the *Rutland* case involving venue determinations. In substance and effect, this Court approved the prior decisions relating to diversity jurisdiction and refused to attribute to unincorporated associations a citizenship apart from the citizenship of all of its individual members. This holding with respect to the citizenship of unincorporated associations is wholly irrelevant to the venue issue presented here.

If the holding of the Court of Appeals in this case is correct, it must be assumed that this Court in the *Steelworkers'* case overruled a long line of cases without the slightest reference to them and that it established basic venue doctrine without any mention of the subject. This Court's opinion, however, indicates that it was most careful to confine its holding to the precise issue before it. Thus, this Court's statement of the issue carefully limits it to a determination of the citizenship of an unincorporated labor union "for purposes of federal diversity jurisdiction" (382 U.S. 145, 147). In its evaluation of the arguments advanced by counsel representing the unincorporated association, the Court limited itself to "the force of these arguments in relation to the diversity jurisdiction" (382 U.S. 145, 150). The concluding paragraph of the Court's opinion emphasizes again that its decision is limited to the status of unincorporated labor unions "for diversity purposes." We respectfully suggest that the decision by this Court, affirming its prior determinations with respect to the status of unincorporated associations for diversity purposes, can not and should not be read to accomplish the rejection of numerous cases and principles which have prevailed for many years with respect to the venue of federal courts.

(2) The decision of the Court of Appeals squarely conflicts with the decision of the Court of Appeals for the Second Circuit in *Rutland Railway Corporation* v. *Brotherhood of Locomotive Engineers*, 307 F.2d 21 (2d Cir. 1962), certiorari denied 372 U.S. 954. In the *Rutland* case (reproduced as Appendix C hereto), the Court held that venue for an unincorporated association is proper in any judicial district in which it does business. As shown by the fore-

going discussion, the reasoning in the *Rutland* case is based upon Judge Learned Hand's decision in *Sperry Products* v. *Ass'n of American R.R.'s*, 132 F.2d 408 (2d Cir. 1942), cert. denied 319 U.S. 744. The decision in the present case, holding that venue as to an unincorporated association is proper only where it maintains its principal place of business, is obviously in conflict with the *Rutland* case. It is essential, therefore, that this conflict relating to an important matter of procedure in the federal courts be resolved by this Court.

It is particularly significant that the conflicting decisions involve the same basic facts and a common unincorporated association. In the *Rutland* case, the Brotherhood of Railroad Trainmen was one of the four appellants raising the venue question (307 F.2d 21 at p. 24). Moreover, the activities of the Brotherhood upon which the Court predicated its conclusion that venue was proper in Vermont are the same as those shown by the record in the present case. These activities were described by the Court in the *Rutland* case as follows:

> "Turning to the case before us, we hold that the defendant brotherhoods were doing business in the District of Vermont. They set up and maintained grievance committees and other facilities among the employees of the Rutland Railway in Vermont. They organized a strike of railroad employees in Vermont. They negotiated with the management of the plaintiff railroad in Vermont. Therefore, we conclude that venue for this action in the District of Vermont was proper and we affirm the order of the court below denying the motions to dismiss." (p. 30, Appendix C, pp. 41-42.)

The Colorado activities of the Brotherhood also include a General Grievance Committee with headquarters at Denver, a strike of railroad employees in Colorado, and negotiations with the Rio Grande in Colorado (R. 92-94, 157-58).

As matters now stand under the conflicting federal decisions, the Brotherhood of Railroad Trainmen may be held accountable for an illegal strike in the judicial district in which it incurs such liability, if the scene is laid in New York, Vermont or Connecticut. But if the illegal strike occurs in Arizona, Colorado, Kansas, New Mexico, Oklahoma, or Utah, the plaintiff carrier must proceed to Cleveland, Ohio, in order to secure redress.[1] It is most difficult, therefore, to imagine a more fundamental conflict than that presented by the decision of the Court of Appeals in the *Rutland* case, and the present decision.

Moreover, the conflict is more widespread than indicated above since the principle articulated by the *Rutland* case has been followed in other jurisdictions. The prevalance of the *Rutland* principle is indicated by the following cases: *American Airlines, Inc.* v. *Air Line Pilots Association, International*, 169 F. Supp. 777, 782, (S.D.N.Y., 1958); *Portsmouth Baseball Corp.* v. *Frick*, 132 F. Supp. 922 (S.D.N.Y., 1955); *Eastern Motor Express* v. *Espenshade*, 138 F. Supp. 426 (E.D.Pa., 1956); and *Chicago & North Western Ry. Co.* v. *Brotherhood of Locomotive Engineers*, 202 F. Supp. 277 (S.D.Ia., 1962). These cases are approved by Professor Moore in 1 Moore's Federal Practice (2d ed.),p. 1508, where the author states:

> "The position taken by these courts is desirable and there is a built-in protection from abuse contained in 28 USC § 1404(a). Although 28 USC § 1391 does not on its face apply to unincorporated associations, where [as here] an unincorporated association carries on multi-state activities, application of its principle is certainly justified."

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[1] The Brotherhood of Railroad Trainmen holds representation rights on railroads operating in all of these states, as shown by the Thirty-First Annual Report of the National Mediation Board, pp. 78-86.

To the same effect see Note, Federal Venue for Unincorporated Associations, 44 Calif. L. Rev. 130, 140 (1956); Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983, 1080 (1963).

The only case since 1948 where it appears that a court refused to follow the principle that an unincorporated association should have the same venue as a corporation under § 1391(c) is *Cherico* v. *Brotherhood of R.R. Trainmen*, 167 F. Supp. 635 (S.D.N.Y., 1958). The *Cherico* case was later rejected, however, by the Court of Appeals for the same circuit in *Rutland Railway Co.* v. *Brotherhood of Locomotive Engineers*, 307 F.2d 21, 29 (2d Cir. 1962).

A reading of the other post-1948 cases which superficially appear to follow the proposition that an unincorporated association only resides for venue purposes at its principal place of business, shows that they failed to consider the problem in light of § 1391(c) and that they merely relied upon the decision in the *Sperry* case for this conclusion.[1]

With respect to unincorporated associations such as the union here, which transacts business in many states, the application of the principles of the *Rutland* case is entirely justified. The union here suffered no undue hardship because it was required to stand suit in Colorado. There is

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[1] Section 1391(b) of the venue statute was amended by Public Law 89-714, approved on November 2, 1966, by addition of the italicized words in following quotation of that Section:

> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, *or in which the claim arose,* except as otherwise provided by law."

The intended scope and application of the amendment is unclear. In any event, the amendment does not resolve the conflict created by the decision of the Court of Appeals as to the residence of unincorporated associations for venue purposes.

a built-in protection in § 1404(a) of 28 U.S.C. for the union if in certain instances the defense of a suit is peculiarly oppressive in a particular district. In the instant case, venue is especially appropriate in the District of Colorado, for the respondent's activities in question took place there, the Brotherhood concededly does business there, and respondent Carroll resides there (R. 5, 6-8, 10, 92).

(3) Even if the principles affirmed by this Court in *Steelworkers* v. *Bouligny*, 382 U.S. 145 are relevant to venue questions, the lower court's resolution of what it described as the vital venue issue in the present case is inconsistent with the *Steelworkers* decision. The Court of Appeals stated the question to be decided as follows:

> "Venue here depends upon whether the Brotherhood is held to reside within the judicial district of Colorado or in Cleveland, Ohio, where its headquarters and principal place of business is located." (Appendix A, *infra*, p. 26.)

Apparently the court below resolved the issue thus posed by deciding that the Brotherhood is a resident of Cleveland, Ohio, where it has its principal place of business. This result, however, can only be reached by treating the Brotherhood, an unincorporated association, as an entity and thus arriving at a result comparable to that reached by Judge Learned Hand in the *Sperry Products* case. As the preceding discussion shows, Judge Learned Hand reached this result by assimilating an unincorporated association to a corporation. In the absence of such assimilation, the unincorporated association would be regarded as an inhabitant or resident of the places inhabited by its members or at which its members reside. Judge Learned Hand recognized this consequence, stating:

> ". . . for most purposes the law still looks at such associations as mere aggregations of individuals." (132 F.2d 408, 411.)

A similar result would follow from applying the rationale of the *Steelworkers* case to the venue problem here involved. This Court in the *Steelworkers* case recognized that unless it treated the unincorporated association as a corporation for purposes of determining its citizenship, "the generally prevailing principle that an unincorporated association's citizenship is that of each of its members" would control for diversity purposes (382 U.S. 145, 146). Consequently, if the decision of this Court in the *Steelworkers* case is controlling, then the residence of the Brotherhood for venue purposes would necessarily be the residence of each of its members, not its principal place of business. Thus, the *Steelworkers* decision can not possibly be used to arrive at the result indicated by the court below. A proper application of the rationale of the *Steelworkers* decision would require the court below or other courts that follow its reasoning to reject both of the alternatives posed in the statement of the crucial issue quoted above (Appendix A, *infra*, p. 26). Under the principles espoused in the decision of this Court in the *Steelworkers* case, the residence of the Brotherhood would not be Colorado or Cleveland, Ohio, but would be all of the many states or judicial districts in which its members reside. In the case of the Brotherhood of Railroad Trainmen, which has members in virtually every judicial district, venue would never be proper in a federal court since there is no single district in which all of its members reside.

Insofar as the views of this Court on the venue problem in this case are concerned, the recent decision in *Pure Oil Company* v. *Suarez*, 384 U.S. 202, is considerably more relevant than the *Steelworkers* decision. In the *Pure Oil* case this Court had before it the venue requirements of the Jones Act which provided that venue would be proper in the district in which the defendant employer resides or in which

his principal office is located. This Court stated the issue and its resolution thereof as follows:

> "Preliminarily it should be noted that although this provision is framed in jurisdictional terms, the Court has held that it refers only to venue, *Panama R. Co.* v. *Johnson*, 264 U.S. 375. It is conceded that as enacted and originally interpreted the statute would not authorize Florida venue in this instance, for corporate residence traditionally meant place of incorporation, in this case Ohio, and Pure Oil's principal office is in Illinois. The Court of Appeals held, however, that residence had been redefined by the expanded general venue statute, 28 U.S.C. § 1391(c) (1964 ed.), passed in 1948. That statute provides:
>
> > "'A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the *residence* of such corporation for venue purposes.' (Emphasis added.)
>
> "If this definition of residence is applicable to the Jones Act venue provision, it is conceded that the action was properly brought in Florida, where Pure Oil has transacted a substantial amount of business. We hold that this definition does so apply and that venue in Florida was proper." (pp. 203-204.)

This Court stated the controlling principle as follows:

> "Although there is no elucidation from statutory history as to the intended effect of § 1391(c) on special venue provisions, the liberalizing purpose underlying its enactment and the generality of its language support the view that it applies to all venue statutes using residence as a criterion, at least in the absence of contrary restrictive indications in any such statute." (pp. 204-205.)

The substance of this Court's decision in the *Pure Oil* case is that the more recent definition of residence for

venue purposes contained in the general venue statute should be applied to the venue requirement of the Jones Act, although the amendment to the general venue statute does not expressly indicate an intent to thus amend the requirements of the Jones Act. The same approach in the present case would require the result reached by the Court of Appeals for the Second Circuit in the *Rutland* case. The essential effect of the *Rutland* case was to update the concepts formulated by Judge Hand in *Sperry Products* to make them consistent with the 1948 amendments, just as the *Pure Oil* case updated the Venue provisions of the Jones Act.[1]

(4) The Court of Appeals clearly erred in setting aside the findings of the District Court with respect to the liability of respondent R. E. Carroll. The District Court's judgment holding R. E. Carroll liable for the damages accruing from the unlawful strike was correct and should have been affirmed by the court below. R. E. Carroll's responsibility for the strike in question is most conclusively fixed by the documents of record relating to the institution and cessation of that illegal withdrawal from service. With respect to the institution of the strike, counsel for the Brotherhood stated that the strike was called "pursuant to a letter that was sent to the railroad on

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[1] Assuming that venue was improper as to the Brotherhood at the time the Court of Appeals rendered its decision, the decision to *dismiss* the action was erroneous for the following reasons: (a) There was a full trial on the merits and there is no indication that the Brotherhood was inconvenienced in any manner; accordingly, if venue was improper this was at most harmless error. *Whittier* v. *Emmet*, 281 F.2d 24 (D.C. Cir. 1960), 1 Moore, Federal Practice (2d ed.), pp. 1964-1965. (b) Pursuant to § 1406(a), the Court of Appeals should have remanded the case to the district court to determine whether, in the interest of justice, the case should be transferred rather than dismissed. *Hayes* v. *Livermont*, 279 F.2d 818 (D.C. Cir. 1960).

May 16 . . ." (R. 25). The crucial document thus identified is a letter addressed to the Rio Grande stating that "the strike of brakemen is reset for 2:00 p.m., May 16, 1960" (Plaintiff's Exhibit 1, R. 157-58). This letter emanating from respondent Carroll's Denver office, is signed by two individuals, R. H. McDonald, Vice President of the Brotherhood of Railroad Trainmen, and R. E. Carroll, General Chairman of the Brotherhood of Railroad Trainmen. It is clear from this document that the overall responsibility of the Brotherhood in the premises was shared by R. E. Carroll as the General Chairman of the Brotherhood of Railroad Trainmen and Mr. McDonald as a vice president of the Brotherhood of Railroad Trainmen.

With respect to the termination of the strike, respondent Carroll testified that he issued instructions "calling off the strike" and that he did that through "telephoning and sending the telegrams" (R. 93). It is clear from respondent Carroll's testimony on this subject that his authority in the premises was primary and that his instructions were final and determinative as to whether the strike was to continue or terminate. Accordingly the District Court correctly found and concluded that respondent Carroll was responsible for, and was liable for the damages resulting from the unlawful strike.

The Court of Appeals suggested that since the local chairmen were dismissed from the action, R. E. Carroll also should have been dismissed (Appendix A, *infra*, p. 27). Insofar as the local chairmen are concerned, there is no evidence of record that they were responsible for instituting the strike in question. The significant difference in the record between respondent Carroll's situation and the situation of the local chairmen was, in fact, recognized by counsel for the Brotherhood during the trial in the District Court. At the time of the pretrial conference when the documents

referred to above had been produced, counsel for the respondents stated:

> "Any of the documents that have been produced would only show that Mr. Carroll was the only one who had any connection with it at all." (R. 33.)

At the conclusion of the trial in the District Court the proposed findings submitted by the respondents recognized this state of the record. Thus, proposed finding No. 7, submitted by respondents, was as follows:

> "The Trial record does not sustain the allegations of the complaint with respect to B. E. Roark, A. J. Myers, J. W. Crocker, M. C. Brown, Carl F. Ahrens, N. E. Doolittle, and M. C. Feather. These defendants are not shown to have participated in any way in the calling or conduct of the strike nor is there any evidence with respect to their relationship, if any, with the Brotherhood." (R. 69.)

Respondent Carroll is not among the individuals listed in this proposed finding.

Counsel for respondents emphasized both the absence of any evidence or responsibility on the part of the local chairmen and the undoubted responsibility of respondent Carroll at the conclusion of the trial, as shown by the following:

> "The Court: There is another matter I think we might iron out here and now. The case is against the Brotherhood of Railroad Trainmen and certain named individuals.
>
> "Now, with the exception of Mr. Carroll, I haven't heard any testimony about these other individuals.
>
> "Mr. Cummings: That was briefed before Judge Phillips, Your Honor, and—
>
> "Mr. Highsaw: The question that was briefed before Judge Phillips, Your Honor, was whether or not hav-

> ing named these people in the complaint they had properly stated a class action, but now we have had in evidence and the record is closed on the question of the strike and I agree with you there is no evidence at all that anyone had anything to do with this strike other than the Brotherhood and Mr. Carroll, ..." (R. 155.)

It is apparent, therefore, that at the conclusion of the proceedings in the District Court there was agreement between all of the parties that responsibility for the strike was that of respondent Carroll and the Brotherhood.

The Court below also suggested that respondent Carroll "was not an officer of the union" (Appendix A, *infra*, p. 27). When respondent Carroll testified in this action he identified himself as "General Chairman of the General Grievance Committee, Brotherhood of Railroad Trainmen on the D&RGW" (R. 92). An affidavit by respondent Carroll reiterates his official capacity as "Chairman of the General Grievance Committee of the Brotherhood of Railroad Trainmen for the Denver And Rio Grande Western Railroad System." (R. 10.)

The General Grievance Committee, of which respondent Carroll is the Chairman, is the agency through which the Brotherhood functions insofar as its representation rights on the Rio Grande are concerned and respondent Carroll, of course, is the head of that instrumentality. Perhaps the clearest proof of the important official capacity which respondent Carroll occupies in the Brotherhood is the fact that the basic collective bargaining agreement between the Rio Grande and the Brotherhood is signed on behalf of the Brotherhood by Carroll alone. There is no other Brotherhood signatory to that agreement, which Carroll signed as "General Chairman, Brotherhood of Railroad Trainmen." This agreement is referred to by the court below in a footnote of its Opinion (Appendix A, *infra*, p. 25). It is also

referred to by the Brotherhood in its suggested findings (R. 68), and there are other references to it in the record before this Court.

This case was tried by the District Court without a jury. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, in such cases the "findings of fact shall not be set aside unless clearly erroneous." This Court has stated in *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 395 (1948) that:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

We most respectfully submit that the entire evidence shows that respondent Carroll is not only an officer of the Brotherhood but is the governing officer of that organization on the Rio Grande. Accordingly the District Court's determination that respondent Carroll was responsible for the damages caused by the Brotherhood's unlawful strike was clearly correct and the action of the Court of Appeals in setting it aside was erroneous.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ERNEST PORTER,
KENNETH D. BARROWS,
MARTIN M. LUCENTE,
RICHARD H. COMPERE,
GEORGE L. SAUNDERS, JR.,

Attorneys for Petitioner

SIDLEY, AUSTIN, BURGESS & SMITH
Of Counsel

November 22, 1966

STATE OF ILLINOIS }
COUNTY OF COOK } ss

AFFIDAVIT OF SERVICE

Richard H. Compere, being first duly sworn, on oath deposes and states that he has served the attached petition for writ of certiorari upon counsel for respondent by placing copies of the same in a United States mail box, with first class air mail postage prepaid, addressed to:

PHILIP HORNBEIN, JR.
2007 Security Life Building
Denver, Colorado 80202

JAMES L. HIGHSAW, JR.
Suite 620 Tower Building
Washington, D. C. 20005

Richard H. Compere
RICHARD H. COMPERE

Subscribed and sworn to before me this 22nd day of November, 1966.

Robert M. Brayfield
NOTARY PUBLIC

APPENDIX A

Filed United States Court of Appeals, Tenth Circuit, Sep. 21, 1966, Robert B. Cartwright, Clerk.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM—1966

BROTHERHOOD OF RAILROAD TRAINMEN and R. E. CARROLL, Appellants,

v.

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Appellee.

NO. 8196

APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

James L. Highsaw, Jr. (Philip Hornbein, Jr., Hornbein & Hornbein, and Mulholland, Hickey & Lyman on the brief) for Appellants.

Martin Lucente (Ernest Porter, Kenneth D. Barrows, Walter J. Cummings, Jr., Richard H. Compere, and Sidley, Austin, Burgess & Smith on the brief) for Appellee.

Before MURRAH, Chief Judge, PICKETT and LEWIS, Circuit Judges.

PICKETT, Circuit Judge.

Seeking damages alleged to have resulted from an unlawful strike, the Denver & Rio Grande Western Rail-

road Company, a Delaware corporation with its principal place of business in Denver, Colorado, brought this tort action against the Brotherhood of Railroad Trainmen,[1] the chairmen of the Brotherhood of Railroad Trainmen locals in Colorado, and R. E. Carroll, representing the Brotherhood on the Rio Grande as Chairman of the General Grievance Committee. The trial court overruled the Brotherhood's motion to dismiss, which included an allegation that venue of the action did not lie in the United States District Court for the District of Colorado. Following a trial, the local chairmen were dismissed from the action, and judgment in the sum of $37,988.37 was entered against the Brotherhood and Carroll. This appeal followed.

The National Railroad Adjustment Board made two awards for the payment of money to the Brotherhood, which the Railroad refused to pay. On May 16, 1960, at 2:00 P.M., a strike was called on the property of the Rio Grande for the purpose of compelling payment of the awards. At about 6:30 P.M. on the same day, a temporary restraining order enjoining continuance of the strike was served upon Carroll. A few hours later the strike was discontinued over the entire system and never renewed. Thereafter, holding the strike to be illegal, the district court issued a preliminary injunction which became permanent on July 27, 1960. (185 F. Supp. 369, aff'd 294 F.2d 266). Meanwhile, believing that a strike threat still existed, several shippers, principally Ford and its suppliers, between May 19th and June 1, 1960, diverted freight shipments from Rio Grande lines. It is for the loss of revenue caused by these diversions that the district court allowed recovery.

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[1] The Brotherhood was the duly certified representative under the Railway Labor Act of certain employees of the Rio Grande, and at all times during this controversy there was in effect a collective bargaining agreement.

At the outset, we are confronted with the contention that venue of the action does not lie in the United States District Court for the District of Colorado. The venue statute, 28 U.S.C. § 1391(b), states:

> "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

Venue here depends upon whether the Brotherhood is held to reside within the judicial district of Colorado, or in Cleveland, Ohio, where its headquarters and principal place of business is located. Section 1391(c) provides:

> "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and shall be regarded as the residence of such corporation for venue purposes."

Relying upon Rutland Ry. Corp. v. B. of R. T., 2 Cir., 307 F.2d 21, and like authorities holding that incorporated associations, including unincorporated national labor unions, should be treated as corporations,[2] the district court upheld venue. Subsequent to the entry of judgment, the Supreme Court, in Steelworkers v. Bouligny, Inc., 382 U.S. 145, while recognizing the validity of the reasoning in cases like Rutland, held that an unincorporated labor union was not yet in the same category as a corporation, and that if such unions were to be treated as corporations, the change should be made by Congress and not by judicial determina-

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[2] The rule is stated in the Rutland case as follows:

> "Since the residence of a corporation for venue purposes has been expanded to include all the judicial districts in which the corporation is doing business, the residence of an unincorporated association for venue purposes should likewise be expanded to include all the judicial districts in which the unincorporated entity is doing business."

tion. Although the court in the Bouligny case was discussing the diversity statute, the holding was clearly to the effect that unincorporated associations were basically different from corporations. It was a rejection of the principle espoused by the Rutland case, upon which the Rio Grande relies to sustain venue. For venue purposes, the Brotherhood is not a resident of Colorado as required by § 1391(b), and consequently, the complaint must be dismissed.

The Railroad suggests that even if venue did not exist as to the Brotherhood, the proper procedure would be to drop it from the case and let the judgment stand against Carroll, a Colorado resident. Carroll was Chairman of the General Grievance Committee on the Rio Grande; he was not an officer of the union. So far as the record shows, Carroll's role in connection with the strike was limited to sending the Railroad notice of the Brotherhood's strike decision and thereafter advising the local unions of the issuance of the restraining order. Carroll had no more to do with causing the strike than did the chairmen of the locals, and accordingly, he too should have been dismissed from the action.[3]

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[3] The trial court found only that Carroll was "General Chairman of the General Grievance Committee of the Brotherhood on the property of the plaintiff" and that he notified the local groups to call off the strike after service of the temporary restraining order.

REVERSED.

APPENDIX B

§ 1391 of Title 28, United States Code. Pertinent provisions are:

"(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

"(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Rule 52(a) of the Federal Rules of Civil Procedure:

"(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963."

APPENDIX C

RUTLAND RAILWAY CORPORATION,
Plaintiff-Appellee,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS et al., Defendants-Appellants.

No. 259, Docket 26760.

United States Court of Appeals
Second Circuit.

Argued March 8, 1962.
Decided June 18, 1962.

Thomas Wm. Lynch, Rutland, Vt. (Clark, Carr & Ellis, by Charles D. Peet, Donald L. Wallace, Harry F. Martin, Jr., New York City, of counsel), for plaintiff-appellee.

Philip H. Hoff, Burlington, Vt., Harold N. McLaughlin, Harold A. Ross, Cleveland, Ohio, Donald W. Fisher, Toledo, Ohio (Harold C. Heiss, Cleveland, Ohio, V. C. Shuttleworth, Cedar Rapids, Iowa, Wayland K. Sullivan, Cleveland, Ohio, Black, Wilson & Hoff, Burlington, Vt., Marshman, Hornbeck, Hollington, Steadman & McLaughlin, Cleveland, Ohio, of counsel), for defendants-appellants.

Before WATERMAN, KAUFMAN and MARSHALL, Circuit Judges.

WATERMAN, Circuit Judge.

The four appellant labor unions, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Brother *(sic)* of Railroad Trainmen, and the Order of Railroad Conductors and Brakemen, hereinafter referred to collectively as the defendant brotherhoods, and the five individual appellants, each either a gen-

eral or local chairman of one of the above-mentioned brotherhoods, appeal from a judgment order of the United States District Court for the District of Vermont, enjoining as of October 27, 1960, the unions, their members, and agents from further striking, picketing or using any other form of economic coercion in connection with a dispute which the plaintiff Rutland Railway Corporation had submitted to the National Railroad Adjustment Board, the injunction to remain in effect until the Board had disposed of the dispute.

The strike began on September 16, 1960. It continued until the injunction order was effective. Then, obedient thereto, the workers went back to their jobs.

The Rutland Railway operations are divided into three subdivisions. One subdivision runs from the New Hampshire border at Bellows Falls, Vermont, to Rutland, Vermont, and is approximately 52 miles long. The main line subdivision runs northerly from the southwestern corner of the State of Vermont through North Bennington, Rutland, and Burlington, Vermont, to the northern tip of Lake Champlain at Alburg, Vermont, a distance of about 155 miles. At Alburg the road proceeds westerly across northern New York State through Malone and Norwood, New York, to Ogdensburg, New York, a distance of one hundred twenty-two miles. Malone is halfway between Alburg and Ogdensburg. Norwood, between Malone and Ogdensburg, is 35 miles from the former and 25 miles from the latter. The portion of the line from Alburg to Ogdensburg is called the Ogdensburg Subdivision.

On November 2, 1959, the Rutland Railway, which had been in financial difficulty, sent notices to the general chairmen of the four defendant brotherhoods, as the duly recognized representatives of the Rutland's operating employees, to inform the labor organizations that the carrier

proposed, among other things, to change all existing agreements and rules which would prevent it from consolidating and abolishing crew terminals, merging seniority districts, and establishing interdivisional runs.[1] As part of a con-

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[1] The relevant part of the notices given by the Rutland were as follows:

"We hereby give notice, under our existing agreements and pursuant to the provisions of the Railway Labor Act, that effective January 1, 1960, we propose to revise and supplement such agreement or agreements in accordance with the proposal set forth in 'Attachment A' appended hereto.

"ATTACHMENT A

• • •

"ROAD TRAIN AND ENGINE SERVICE ASSIGNMENTS.

"A. Except as hereinafter provided, eliminate all agreements, rules, regulations, interpretations, and practices, however established, applicable to any class or grade of road train or engine service employees, which

"(i) prohibit or impose restrictions on the right of the carrier to establish, move, merge or consolidate seniority districts.

"(ii) prohibit or impose restrictions on the establishment or operation of interdivisional, inter-seniority district, intra-divisional or intraseniority district runs.

"(iii) prohibit or provide penalties for running crews through established crew terminals, or

"(iv) provide for automatic release of crews upon arrival at terminals or end of run, or when off of assigned territory.

"B. Establish a rule to provide that

"1. The carrier shall have the right to establish, move, consolidate and abolish crew terminals, to merge and consolidate seniority districts, and to establish interdivisional, interseniority district, intradivisional and intraseniority district runs in assigned and unassigned service with the right to operate any such run, whether assigned or unassigned (including extra service), on either a one way or turn-around (including short turn-around) basis and through established crew terminals.

• • •

"2. No rule, regulation, interpretation or practice, however established shall be construed to in any way prohibit,

certed country-wide effort to initiate national discussion of railroad problems most of the Class I carriers in the nation also delivered similar notices to brotherhood officers.

The issuance of these notices was required by Section 6 of the Railway Labor Act, 44 Stat. 582 (1926), as amended, 45 U.S.C.A. § 156.[2] At the time these notices were sent the

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restrict or limit the provisions of paragraph 1 of this rule except as provided in sub-paragraphs (a) and (b) of this paragraph 2.

* * * * * * * * * * * * *

"(b) Before a run is established under the provisions of this rule which the carrier does not now have the right to establish without agreement with its employees, and which involves both the establishment of a new home terminal for the class of service involved and operation through an established crew terminal or terminals for such class of service, the carrier shall give notice to the general chairman * * *

"3. All agreements, rules, regulations, interpretations and practices, however established, which conflict with the above shall be eliminated, except that existing rules and practices considered by the carrier to be more favorable are preserved."

[2] The section reads:

"Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Rutland Railway had collective bargaining agreements with the brotherhoods.

On November 30, 1959, conferences between representatives of the Rutland and representatives of its employees were commenced in order to consider the proposals contained in the Section 6 notices sent November 2. The parties failed to reach agreement on any of the proposals, and the conferences were soon recessed. The railroad then delegated authority to the Carriers' Eastern Conference Committee to further confer on behalf of the Rutland, and the labor representatives delegated their authority so to do to the National Conference Committee of the four brotherhoods.[3]

The Rutland's financial plight continued to worsen. In the first eight months of 1960 it was hauling 5300 carloads of freight less than it was hauling in the comparable period of 1959. Its operating revenues were $264,000 less than those of the same period in 1959. Therefore the railroad's board of directors met in the spring and summer of 1960

[3] The representatives of the employees countered with proposals of their own, served by a Section 6 notice on September 7, 1960. National conferences on these controversies were suspended when the Presidential Railroad Commission was established on November 1, 1960. The President authorized and directed the Commission "to investigate and inquire into the issues raised by the proposals of the parties involved in the above-mentioned controversy with the objective of making a report to the President, including its findings and recommendations with respect to the controversy, and assisting in achieving an amicable settlement and agreement with respect to issues in dispute between the parties." The Commission rendered its report and recommendations on February 28, 1962. As yet, no agreement between labor and management has been reached on the railroads' proposals to change all rules preventing consolidation of crew terminals, merger of seniority districts and establishment of interdivisional runs.

in order to devise methods for combatting the company's financial problem. A plan was finally agreed upon whereby certain operating expenses would be reduced by the abolition of several freight runs.

On its Ogdensburg Subdivision, which stretched from Alburg, Vermont, to Ogdensburg, New York, the Rutland had operated a total of four freight trains and two yard switchers. From east to west on the Ogdensburg Subdivision, there were terminals at Alburg, Vermont; Malone, New York; Norwood, New York; and Ogdensburg, New York. Two of these trains operated daily in opposite directions between Alburg and Norwood. The two other trains operated out of Malone, one going to Ogdensburg and returning each day, the other going to Alburg and returning each day. Pursuant to the decision of its directors to reduce the number of freight runs, the railroad posted bulletins on September 8, 1960, announcing that beginning September 17 the four existing daily freight runs on the Ogdensburg Subdivision were to be replaced by two, running daily between Alburg and Ogdensburg in opposite directions. This new schedule would reduce the number of jobs on the subdivision by ten and would change the home terminals of some of the trainmen whose jobs were not eliminated.

On September 14 the railroad learned that its employees would strike in an attempt to prevent these new schedules from becoming effective. On the morning of September 15 the brotherhoods, obviously referring to the schedule changes on the Ogdensburg Subdivision, telegraphed the railroad that they would go on strike at 12.01 A. M., September 16 because "carrier cancelling 1957 and 1959 agreements by bulletins and changing home terminals and running thru former terminal for certain local freight crews." The railroad replied in part as follows:

> "Rutland Railway Corporation effective Sept. 17, 1960 will arrange train assignment to conform to the de-

mands of traffic. The change is not and cannot be shown to have violated any rule or agreement as alleged. No agreement has been violated and the carrier is merely exercising its right to operate in an economical manner. Conferences on this issue have not been held on the property with the [brotherhoods]."

The operating employees punctually struck at the time indicated by the brotherhoods' telegram that the strike would begin.[4]

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[4] Meanwhile, another dispute was raging between the Rutland Railway and its employees. This second dispute was only tangentially related to the dispute spelled out in the text. In August 1960 the brotherhoods asked for pay increases for the employees whom they represented. A conference to negotiate this dispute convened on August 30, eight days prior to the September 8 bulletin. The president of the railroad explained to the labor representatives that the financial condition of the carrier made it impossible for management to meet the wage demands of the unions but he stated that if certain rule changes were agreed to by the unions the savings from these changes might permit increases in pay. The changes proposed by the railroad were these:

1. Eliminate all arbitraries.
2. Open closed yards—the only closed yard on this property is Rutland yard, closed to trainmen (yardmen).
3. Dovetail rosters, each craft, Vermont and New York divisions.
4. Make provisions for operating road switchers.
5. Provide for operation of trains between assigned terminals so that wage payments will equal the miles run and/or an 8 hour day.

The brotherhoods contended at the district court hearing that a spokesman for the management explained that change No. 5 meant the running of trains through established home terminals, but the district court refused to make such a finding. The August 30 conference ended without success. On September 7, 1960 (see footnote 3), the general chairman of the Brotherhood of Railroad Trainmen served a Section 6 notice on the railroad asserting that the brotherhood desired to change existing rates of pay and rules. On Septem-

Ten days later, on September 26, the railroad filed a complaint in the United States District Court for the District of Vermont, asking the court to enjoin a further strike, to order the defendants to comply with the procedural requirements of the Railway Labor Act, and to award damages to the plaintiff.

To support its claim for an injunction the railroad, defining the disagreement with its employees to be whether the management of the railroad had the right to rearrange train runs and thereby reduce jobs and change crew terminals without first negotiating the matter with the representatives of its workers, promptly submitted the dispute to the National Railroad Adjustment Board under the "minor dispute" provisions of the Railway Labor Act, §§ 2 Second, Sixth, 3, 44 Stat. 577, 578 (1926), as amended, 45 U.S.C.A. §§ 152 Second, Sixth, 153. On October 7 the defendants moved to dismiss the action because of improper venue. This motion was denied on October 10. The defendants then answered, and filed a counterclaim in which they on their part sought an injunction preventing the railroad from putting into effect the schedule of changes set forth in its bulletins of September 8 until at least the relevant procedures provided by the Railway Labor Act should have been exhausted.

After holding hearings on the merits of the respective claims the district court issued an injunction enjoining the strike. A consideration of the railway's prayer for an award of damages was postponed to a later date. In its opinion, reported at 188 F.Supp. 721 (D.Vt.1960), the

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ber 12, the railroad agreed to submit the union's proposals to national bargaining under the auspices of the National Mediation Board. A National Mediator came to Rutland to mediate this dispute over future wages. There was testimony at the hearing that the Mediator's work did not relate to the dispute over the bulletined changes in train schedules on the Ogdensburg Subdivison.

court held that the dispute out of which the strike arose was a minor one, subject to the jurisdiction and decision of the National Railroad Adjustment Board and that the Section 6 notice of November 2, 1959, sent out by the Class I railroads on the national level did not alter the minor nature of this particular dispute over the rescheduling of freight runs. The court did not grant the defendants' prayer for an injunction to prevent the railroad from effectuating its rescheduling. The defendants appeal to this court, seeking review of the district court decision adverse to them.

The appellants contend that the venue for this action was not properly located in the District of Vermont; that the controversy out of which this litigation arose was not a "minor dispute" as the court below held, but a "major dispute" under the Railway Labor Act, 44 Stat. 577 (1926) as amended, 45 U.S.C.A. §§ 151-163, and that the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C.A. §§ 101-115, deprived the court of jurisdiction to enjoin the strike. The appellee railroad asserts, on the other hand, that the court below was correct in determining the dispute a minor one which permitted the carrier to proceed with its schedule changes and required that the employees desist from striking.

Venue

Three of the defendant brotherhoods, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, and the Brotherhood of Railroad Trainmen, have their headquarters at Cleveland, Ohio. The headquarters of the fourth brotherhood, Order of Railway Conductors and Brakemen, are at Cedar Rapids, Iowa.

Inasmuch as this action arises under the laws of the United States, namely, the Railway Labor Act, the relevant venue provision of the Judicial Code is 28 U.S.C. § 1391(b):

"(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

The brotherhoods assert that, since they are unincorporated associations, the proper venue for an action against any one of them is only in the judicial district where its principal place of business is situated.

In Sperry Prods., Inc. v. Association of Am. R. Rs., 132 F.2d 408 (2 Cir. 1942), cert. denied, 319 U.S. 744, 63 S.Ct. 1031, 87 L.Ed. 1700 (1943), involving the venue provision for patent *infringement actions*, *Judge* Learned Hand discussed the concept of venue as it related to unincorporated associations. The venue statute there involved, 35 Stat. 1084 (1909), 28 U.S.C. § 109 (1940) (now 28 U.S.C. § 1400(b) (1958)), stated that any suit for patent infringement might be brought "in the district of which the defendant is an inhabitant, or in any district in which the defendant • • • shall have committed acts of infringement and have a regular and established place of business." Judge Hand stated that for venue purposes, as well as for other procedural incidents, an unincorporated association should be considered a jural entity, cf. United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344, 42 S.Ct. 570, 66 L.Ed. 975 (1922), and that the only practical approach to the procedural problems created by actions involving unincorporated associations was to assimilate their treatment to that accorded corporations. Therefore, Judge Hand concluded that an unincorporated association should be considered "present" wherever it was continuously carrying on a substantial part of its activities, since this was the standard for the "presence" of corporations. However, he hastened to add that being "present" in a district was not tantamount to being an "inhabitant" of that district. Again assimilating the situation of the unincorporated en-

tity which has no place of incorporation to that of the incorporated entity, Judge Hand announced that the unincorporated entity was an "inhabitant" of the district of its principal place of business.

Although Sperry Prods., Inc. involved the venue provision for patent infringement actions, courts have applied Judge Hand's reasoning in that case to the determination of questions that have arisen involving the general venue statute. Until the revision of the Judicial Code in 1948 there was little difficulty in so doing because the general venue statute, 28 U.S.C. § 112 (1940), provided only that "no civil suit shall be brought in any district court against any person * * * in any other district than that whereof he is an inhabitant * * *." Thus Judge Hand's discussion of where an unincorporated association was an inhabitant was applicable with equal force under the general venue provision as it then existed. See Brotherhood of Locomotive Firemen, etc. v. Graham, 84 U.S. App.D.C. 67, 175 F.2d 802 (1948), rev'd on other grounds, 338 U.S. 232, 70 S.Ct. 14, 94 L.Ed. 22 (1949). Cf. Darby v. Philadelphia Transp. Co., 73 F.Supp. 522 (E.D.Pa.1947). But see Thermoid Co. v. United Rubber Workers, 70 F.Supp. 228 (D.N.J.1947). But in 1948 the general venue statute was redrafted as 28 U.S.C. § 1391; and a subsection (c) was added. This subsection stated:

> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."[5]

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[5] Another difference between the new statute and the old one was that the new one spoke in terms of "residence" instead of "inhabitance"; but it is clear from the Reviser's Notes to § 1391 that the two terms were intended to be synonymous. H.R.Report 308, 80th Cong., 1st Sess. A147 (1947).

Under the venue provision drafted in 1948 courts were faced with the question whether they should follow Judge Hand and hold that an unincorporated association resides only at its principal place of business, or whether the process of assimilation which Judge Hand advocated should be extended by assimilating the treatment of unincorporated associations for venue purposes with the newly expanded concept of corporate residence.

The cases are divided on this issue. Some courts have held that for determining venue an unincorporated association resides only at its principal place of business. Brotherhood of Locomotive Firemen, etc. v. Graham, supra; McNutt v. United Gas Workers, 108 F.Supp. 871, 875 (W.D.Ark.1952); Griffin v. Illinois Cent. R. R., 88 F.Supp. 552, 555 (N.D.Ill.1949); Salvant v. Louisville & N. R. R., 83 F.Supp. 391, 396 (W.D.Ky.1949); Cherico v. Brotherhood of R. R. Trainmen, 167 F.Supp. 635 (S.D.N.Y.1958). Cf. Hadden v. Small, 145 F.Supp. 387 (N.D.Ohio 1951). Other courts have held that an unincorporated association may be sued in any district in which it is doing business. Portsmouth Baseball Corp. v. Frick, 132 F.Supp. 922 (S.D.N.Y. 1955); American Airlines, Inc. v. Air Line Pilots Ass'n, 169 F.Supp. 777 (S.D.N.Y.1958); Eastern Motor Express, Inc. v. Espenshade, 138 F.Supp. 426 (E.D.Pa.1956). And the Supreme Court has not yet spoken on the matter.

Venue in the federal courts is not a jurisdictional concept. See 28 U.S.C. § 1406(b) (1958); H.R.Report 308, 80th Cong., 1st Sess. A154 (1947) (Reviser's Notes). We should not think about it in the metaphysical terms which have often been associated with considerations of jurisdiction. Venue is a concept of convenience. See Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167-168, 60 S.Ct. 153, 84 L.Ed. 167 (1939); Cohen v. Commodity Credit Corp., 172 F.Supp. 803 (W.D.Ark.1959); Jacobson v. Indian-

apolis Power & Light Co., 163 F.Supp. 218 (N.D.Ind.1958); The North River, 57 F.Supp. 808 (E.D.N.Y.1944); Vogel v. Crown Cork & Seal Co., 36 F.Supp. 74 (D.Md.1940). It should be treated in practical terms. See Sperry Prods., Inc. v. Ass'n of Am. R. Rs., supra; American Airlines v. Air Line Pilots Ass'n, supra. Congress has stated in § 1391(c) that the residence of a corporation for venue purposes is not only in the state wherein it is incorporated but also in the places where it is licensed to do business and where it is doing business. It is true that we would be reading into 28 U.S.C. § 1391(c) words which are not there if we should assert that that subsection states that it applies to unincorporated associations. See Cherico v. Brotherhood of R. R. Trainmen, supra. But we do not find any manifestation here of a congressional policy of *expressio unius est exclusio alterius,* and so we follow the reasoning in Sperry Prods. and assimilate the residence of unincorporated associations under 28 U.S.C. § 1391(b) to that of corporations, 28 U.S.C. § 1391(c). Since the residence of a corporation for venue purposes has been expanded to include all the judicial districts in which the corporation is doing business, the residence of an unincorporated association for venue purposes should likewise be expanded to include all the judicial districts in which the unincorporated entity is doing business. We believe this accords with the practical requirements of litigation involving unincorporated associations. If an unincorporated union is carrying on sufficient activities in a particular judicial district so that it is deemed to be doing business there, it usually will suffer no undue hardship if required to stand suit there. If in certain instances the defense of a suit in a particular district is peculiarly oppressive, the association may always seek a transfer of the action under 28 U.S.C. § 1404(a) (1958).

Turning to the case before us, we hold that the defendant brotherhoods were doing business in the Dis-

trict of Vermont. They set up and maintained grievance committees and other facilities among the employees of the Rutland Railway in Vermont. They organized a strike of railroad employees in Vermont. They negotiated with the management of the plaintiff railroad in Vermont. Therefore, we conclude that venue for this action in the District of Vermont was proper and we affirm the order of the court below denying the motions to dismiss.

Minor or Major Dispute

We think that there are only two general questions presented by the issues of labor law involved in this case. They are: First, is this a so-called "major" or "minor" dispute under the Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C.A. §§ 151-163 (1958)? Second, does the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C.A. §§ 101-115 deprive the district court of jurisdiction to enjoin the strike?

For either of these statutes to be operative, there must be first of all a "labor dispute." The Norris-LaGuardia Act, § 13(c), 47 Stat. 73, 29 U.S.C.A. § 113(c), defines a labor dispute as follows:

> "(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

Section 2 of the Railway Labor Act, 44 Stat. 577 (1926), 45 U.S.C.A. § 151a, sets out the disputes to which it applies as "all disputes concerning rates of pay, rules, or working conditions" and "all disputes growing out of grievances or out of the interpretation or application of agreements

covering rates of pay, rules, or working conditions." In Order of R. R. Telegraphers v. Chicago & N. W. R. R., 362 U.S. 330, 80 S.Ct. 761, 4 L.Ed.2d 774 (1960), the Supreme Court explicitly held that a labor dispute existed under the Norris-LaGuardia Act, and implied that one existed under the Railway Labor Act, when a railroad sought to close a number of its stations and thereby reduce employment. The Court stated:

> "Plainly the controversy here relates to an effort on the part of the union to change the 'terms' of an existing collective bargaining agreement. The change desired just as plainly referred to 'conditions of employment' of the railroad's employees who are represented by the union. The employment of many of these station agents inescapably hangs on the number of railroad stations that will be either completely abandoned or consolidated with other stations. And, in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment. The District Court's finding that '[c]ollective bargaining as to the length or term of employment is commonplace,' is not challenged." Id. at 336, 80 S.Ct. at 764.

Numerous other courts have assumed the presence of labor disputes in similar situations. E. g., Hilbert v. Pennsylvania R. R., 290 F.2d 881 (7 Cir.), cert. denied, 368 U.S. 900, 82 S.Ct. 174, 7 L.Ed.2d 96 (1961); In the Matter of Hudson & M. R. R. Co., 172 F.Supp. 329 (S.D.N.Y.), aff'd sub nom. Stichman v. General Grievance Comm. of the Bhd. of R. R. Trainmen, 267 F.2d 941 (2 Cir. 1959), cert. denied, Hatler v. Dawson, 361 U.S. 928, 80 S.Ct. 385, 4 L.Ed.2d 351 (1960). Cf. Butte A. & Pac. Ry. v. Brotherhood of Locomotive Firemen, 268 F.2d 54 (9 Cir.), cert. denied, 361 U.S. 864, 80 S.Ct. 122, 4 L.Ed.2d 104 (1959). The court below was correct when it found that a labor dispute relating to working conditions existed when the case was heard on October 20, 1960.

In order to avoid interruptions to transportation resulting from disputes over rates of pay, rules, or working conditions, to provide peaceful and orderly procedures for the settlement of these disputes, and to foster the organization of employees, 44 Stat. 577 (1926), 45 U.S.C.A. § 151a, the Railway Labor Act was passed in 1926. 44 Stat. 577, as amended, 45 U.S.C.A. §§ 151-163 (1958). The Act contemplates two types of disputes, major and minor, and provides different procedures for handling each. See Railway Labor Act § 2, 44 Stat. 577 (1926), 45 U.S.C.A. § 151a, Hearings on H.R. 7650, before House Committee on Interstate Commerce, 73d Cong., 2d Sess. (1934); Hearings on S. 3266, before Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. (1934). Mr. Justice Rutledge in his oft-quoted opinion for the Court in Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886 (1945), explained the distinction between major and minor disputes under the Railway Labor Act:

> "The first [major dispute] relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
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> "The second class [minor disputes], however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal in-

juries. In either case the claim is to rights accrued, not merely to have new ones created for the future." Id. at 723, 65 S.Ct. at 1290.

See also Hearings on H.R. 7650, before House Committee on Interstate Commerce, 73d Cong., 2d Sess. 47 (1934).

In both types of disputes the Act requires that, as a first step, the parties must make every reasonable effort to settle their differences in conference. § 2 First, Second, 44 Stat. 577 (1926), as amended, 45 U.S.C.A. § 152 First, Second. Elgin, J. & E. Ry. v. Burley, supra at 724-725 and nn. 12, 18, 65 S.Ct. supra at 1290-1291. Major disputes commence with the issuance of a notice known as a "Section 6 notice," given by the party seeking to change existing agreements. §§ 2 Seventh, 6, 44 Stat. 577, 582 (1926), as amended, 45 U.S.C.A. §§ 152, Seventh, 156. In major disputes, if settlement cannot be reached in conference, the matter is referred to mediation under the auspices of the National Mediation Board. § 5, 44 Stat. 580 (1926), as amended, 45 U.S.C.A. § 155. If mediation fails, the Mediation Board proposes voluntary arbitration to the parties, §§ 5, 7, 44 Stat. 580, 582 (1926), as amended, 45 U.S.C.A. §§ 155, 157, a course of action neither party is required to adopt. Brotherhood of R. R. Trainmen v. Toledo, P. & W. R. R., 321 U.S. 50, 64 S.Ct. 413, 88 L.Ed. 534 (1944). Finally, if the President of the United States desires, he is empowered to set up an emergency board to investigate and report to him with respect to the dispute. § 10, 44 Stat. 586 (1926), as amended, 45 U.S.C.A. § 160. The parties are required to comply with each stage in the above-described procedure before either may resort to self-help, and it is the statutory duty of the carrier not to alter rates of pay, rules, or working conditions, i.e., to maintain the status quo, until the Mediation Board has acted upon the dispute. § 6, 44 Stat. 582 (1926), as amended, 45 U.S.C.A. § 156; see

Burke v. Morphy, 109 F.2d 572 (2 Cir.), cert. denied, 310 U.S. 635, 60 S.Ct. 1078, 84 L.Ed. 1404 (1940). Grand International Bhd. of Locomotive Engineers v. Morphy, 109 F.2d 576 (2 Cir.), cert. denied, 310 U.S. 635, 60 S.Ct. 1078, 84 L.Ed. 1404 (1940). However, the Act does not create any tribunal having final authority to decide a major dispute without the consent of both parties, and in such disputes no provision in the Railway Labor Act prohibits the workers from striking as soon as all of the procedures for settling the dispute have been exhausted without a mutually satisfactory solution having been reached.[6]

The procedure under the 1926 Act for handling the other type of dispute (the minor dispute) soon proved ineffectual to produce peace in the railroad industry. Deadlock often resulted from the refusal by one side or the other to participate in the voluntary local boards which the Act contemplated as the source of decision in such disputes. Moreover, in many cases in which boards were established no decision could be reached because of the equal number of labor and management members on each board. These circumstances produced an ever-increasing backlog of unresolved disputes. See Hearings on S. 3266 before Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. 17,

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[6] Since the Railway Labor Act contains no provison to the contrary, the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C.A. §§ 101-115, operates to prevent the federal courts from enjoining strikes in major disputes, at least after the exhaustion of all of the procedures provided by the Railway Labor Act for settling such disputes. See Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30, n. 24, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957); Brotherhood of R.R. Trainmen v. Toledo, P. & W. R.R., 321 U.S. 50, 64 S.Ct. 413, 88 L.Ed. 534 (1944); Order of R.R. Telegraphers v. Chicago & N. W. R.R., 362 U.S. 330, 80 S.Ct. 761, 4 L.Ed.2d 774 (1960).

137 (1934). To eliminate these roadblocks, the statute was amended in 1934 and the National Railroad Adjustment Board was created, making it unnecessary for the parties to set up local boards. § 3, 48 Stat. 1189 (1934), 45 U.S.C.A. § 153; H.R.Rep. No. 1944, 73d Cong., 2d Sess. 3; S.Rep. No. 1065, 73d Cong., 2d Sess. 1, 2 (1934). Under this amendment, if the parties fail to agree in conference, either side may submit the matter to the National Railroad Adjustment Board. Procedures are provided for assuring that the Board will not become deadlocked, and unless the Board's decision contains a monetary award the decision of the Board is final and binding on the parties. § 3 subd. 1(i) (*l*) (m) (n), 48 Stat. 1189 (1934), 45 U.S.C.A. § 153 subd. 1(i) (*l*) (m) (n), see Union Pac. R. R. v. Price, 360 U.S. 601, 79 S.Ct. 1351, 3 L.Ed.2d 1460 (1959). See generally Garrison, The National Railroad Adjustment Board: A Unique Administrative Agency, 46 Yale L.J. 567 (1937). Thus a system of compulsory arbitration of minor disputes was created by the 1934 amendment. Brotherhood of R. R. Trainmen v. Chicago River & Ind. R. R., 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957); California v. Taylor, 353 U.S. 553, 77 S.Ct. 1037, 1 L.Ed.2d 1034 (1957). See Hearings on H.R. 7650 before House Committee on Interstate Commerce, 73d Cong., 2d Sess. 47, 58, 60, 81-82, 118 (1934); Hearings on S. 3266 before Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. 33, 35 (1934). To effectuate these procedures for the conclusive determination of minor disputes, courts have issued injunctions against strikes by the railroad unions. E. g., Brotherhood of R. R. Trainmen v. Chicago River & Ind. R. R., supra; In the Matter of Hudson & M. R. R., 172 F.Supp. 329 (S.D.N.Y.), aff'd sub nom. Stichman v. General Grievance Comm. of the Bhd. of R. R. Trainmen, 267 F.2d 941 (2 Cir.,

1959), cert. denied, 361 U.S. 928, 80 S.Ct. 385, 4 L.Ed.2d 351 (1960).[7]

The defendants contend that the present controversy is a major dispute under the Railway Labor Act; and, therefore, their strike may not be enjoined, or, at least, may only be enjoined for the short period of time necessary for the exhaustion of mediation and the other major dispute procedures. The railroad, on the other hand, claims that this is a minor dispute; and, therefore, the strike must be enjoined so that the issue between the parties can be decided with finality by the Railroad Adjustment Board. We are called upon to decide whether this dispute is a major or a minor dispute, so that the parties then may go forward under the applicable set of procedures sanctioned by the Railway Labor Act. As Elgin, J. & E. Ry. v. Burley, supra, explained, the difference between major and minor disputes is that the former relate to new agreements or changes in existing contracts whereas the latter involve the interpretation and the application of existing agreements. We readily recognize that here, as in other areas of jurisprudence, the difference, on the one hand, between the interpretation and the application of an existing agreement, and, on the other hand, a change in an original intended basis of agreement is often a question of degree.

In reaching for resolution of this problem of course we must not place undue emphasis on the contentions or the

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[7] There is some doubt whether a federal court has power to issue an anti-strike injunction in a minor dispute before the matter is submitted to the Railroad Adjustment Board. Cf. Manion v. Kansas City Terminal Ry., 353 U.S. 927, 77 S.Ct. 706, 1 L.Ed.2d 722 (1957); Hilbert v. Pennsylvania R.R., 290 F.2d 881 (7 Cir.), cert. denied, 368 U.S. 900, 82 S.Ct. 174, 7 L.Ed.2d 96 (1961). But inasmuch as the Rutland Railway has submitted the present controversy to the Board, we are not here faced with this problem.

maneuvers of the parties. Management will assert that its position, whether right or wrong, is only an interpretation or application of the existing contract. Unions, on the other hand, in their assertions about the dispute at issue, will obviously talk in terms of change. Since a Section 6 notice is required by the statute in order to initiate a major dispute, the labor representatives are likely to serve such a notice in any dispute arising out of any ambiguous situation so as thereby to make the controversy appear more like a major dispute. Compare Order of R. R. Telegraphers v. Chicago & N. W. R. R., 362 U.S. 330, 80 S.Ct. 761, 4 L.Ed.2d 774 (1960). Or they may seek to bring the particular conflict at issue within the bounds of an outstanding Section 6 notice that in reality does not relate to that dispute. See Comment, Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes, 60 Colum.L.Rev. 381, 394-397 (1960).

But, on the other hand, we should not in the process of classifying this dispute as major or minor thereby also adjudicate the merits of the controversy between the parties. If this is a minor dispute, a decision on the merits of the dispute is the function of the National Railroad Adjustment Board; and if this is a major dispute the outcome of the parties' difference is to be determined by extra-judicial forces and procedures. See Order of Ry. Conductors v. Pitney, 326 U.S. 561, 66 S.Ct. 322, 90 L.Ed.318 (1946); Norfolk & P. B. L. R. R. v. Brotherhood of R. R. Trainmen, 248 F.2d 34 (4 Cir., 1957), cert. denied, 355 U.S. 914, 78 S.Ct. 343, 2 L.Ed.2d 274 (1958).

The disagreement between the Rutland Railway and its employees is not whether the train runs on the Ogdensburg Subdivision should be rescheduled, but, instead, whether the railroad has the unilateral right to make those changes without negotiating about them with the brother-

hoods. Cf. Norfolk & P. B. L. R. R. v. Brotherhood of R. R. Trainmen, supra; Missouri-K.-T. R. R. v. Brotherhood of Locomotive Engineers, 266 F.2d 335 (5 Cir., 1959), reversed on other grounds, 363 U.S. 528, 80 S.Ct. 1326, 4 L.Ed.2d 1379 (1960). Whether it be a major or a minor dispute, the disagreement is a dispute over the scope of the railroad's managerial prerogative. It is a major dispute if the present agreements between the railroad and the brotherhoods contain express provisions contrary to the position taken by the railroad or if the clear implication of these agreements is inconsistent with the railroad's proposals. It is a minor dispute if there is a clearly governing provision in the present agreements, although its precise requirements are ambiguous; and it is also minor if what the railroad seeks to do is supported by customary and ordinary interpretations of the language of the agreements.

The unions assert that the Section 6 notices of November 2, 1959, demonstrate that this is a major dispute. These notices were issued pursuant to national handling and similar notices were issued by most of the other Class I railroads in the country on the same day. Hilbert v. Pennsylvania R. R., 290 F.2d 881 (7 Cir.), cert. denied, 368 U.S. 900, 82 S.Ct. 174, 7 L.Ed.2d 96 (1961). Conferences over the changes referred to in those 1959 notices were still going on when the Rutland bulletined the new schedules for the Ogdensburg Subdivision in September 1960.

However, we note that the language in the Rutland's notices was not necessarily inconsistent with the railroad's present contention that it has the right under its existing agreements to change train schedules without negotiation. The November 2, 1959 notices set out a procedure for establishing new runs "which the carrier does not now have the right to establish without agreement with its employees * * *" The notices also state:

"3. All agreements, rules, regulations, interpretations and practices, however established, which conflict with the above shall be eliminated, except that existing rules and practices considered by the carrier to be more favorable are preserved."

The Seventh Circuit, faced with the same notices in Hilbert v. Pennsylvania R. R., supra, held that the railroad's November 2, 1959, Section 6 notices involved in that case did not turn a subsequent controversy over a proposed change in certain home terminals of the road into a major dispute. Cf. Pennsylvania R. R. v. Local 2013 of United R. R. Workers, 178 F.Supp. 53 (E.D.Pa.1959). We believe a similar situation exists in the case before us. The Section 6 notices created a major dispute, but the dispute so created was not the dispute over which the Rutland's employees went out on strike ten and one-half months later. Although there is an apparent similarity between the changes proposed in the notice given by the Rutland on November 2, 1959, and the schedule changes which the railroad later made unilaterally, the court below found that the railroad in making the September 1960 changes was not acting pursuant to the earlier notices. We cannot say that the district court was in error in so finding.

Butte, A. & Pac. Ry. v. Brotherhood of Locomotive Firemen, 268 F.2d 54 (9 Cir.), cert. denied, 361 U.S. 864, 80 S.Ct. 122, 4 L.Ed.2d 104 (1959), relied upon by the defendants, is distinguishable from the present case. In that case the railroad issued Section 6 notices in which it first proposed to allocate certain ore loading formerly done by yard crews to main line crews, and, failing to reach agreement with the representatives of its workers thereon, it then proposed to reduce the size of the yard crews from five men to three men. Since this second proposal, too, was unacceptable, the railroad announced that the shipper would load its own ore. The shipper was Anaconda Copper Company, which con-

veniently happened to own all of the stock of the railroad. The railroad asserted that since the shipper, instead of the carrier, was going to load the ore, the road's dispute with its employees was at an end, and therefore the strike in which its employees were engaged should be enjoined. The court held that the major dispute commenced by the railroad's Section 6 notices continued, for the action taken by the copper company should be imputed to its wholly-owned subsidiary, the railroad. Thus the court there held that the Section 6 notices related to the controversy throughout. That decision turned upon the specific facts in that case relating to the notices and the dispute. Similarly, in the present case, the significance of the Section 6 notices rests to a large extent on what the Rutland Railway intended when it issued the 1959 Secton 6 notices and what the management and the employees intended when they subsequently became involved in the 1960 dispute. In the present case, upon a set of facts different from those in Butte, A. & Pac. Ry., we have concluded that the controversy created by the Rutland's Section 6 notices was not the same controversy over which its employees struck in September 1960.

The Rutland Railway points out several provisions in its agreements with the defendant brotherhoods which, the railroad contends, demonstrate that it had the right to act as it did. One such provision is Article 39(a) of its agreement with the Order of Railway Conductors and the Brotherhood of Railroad Trainmen:

> "(a) All vacant or new runs will be posted on the division on which they occur within five (5) days, to close within five (5) days, and to be assigned to the oldest bidder within ten (10) days, merit, fitness and ability to be considered. In case of men being away when run is advertised, when reporting for duty their claims to the run will be considered if a junior man has been assigned, if such claim, in writing, is made within five (5) days."

The language of Article XXXVII(a) in the carrier's agreement with the Brotherhood of Locomotive Engineers, and that of Article 39(a) in the agreement with the Brotherhood of Locomotive Firemen and Enginemen, is essentially the same as in the article quoted above. Also Article 39(e) in the agreement with the Conductors and Trainmen states:

> "(e) When established runs are changed to operate out of different terminals, schedules changed two (2) hours or more, twenty (20) miles or more, or the layover of such runs changed, they will be considered new runs and bulletined as such."

The railroad also calls our attention to Articles 16 and 31 of its agreement with the Conductors and Trainmen, Articles 17 and 51 of the Brotherhood of Locomotive Firemen and Enginemen agreement, and Article XVII in the agreement with the Engineers. None of these provisions by themselves alone bestow upon the railroad the right unilaterally to change train runs and home terminals. But they are some indication that each agreement, taken as a whole, implicitly recognizes such a right in the carrier. As we said earlier in the opinion, the present controversy is over the extent of the railroad's managerial prerogative. The scope of the management's prerogative is often not spelled out in collective bargaining agreements, but the prerogative exists implicitly to some extent in all such agreements. See Cox & Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board, 63 Harv.L.Rev. 389, 401 (1950); Gunther v. San Diego & Ariz. E. Ry., 198 F.Supp. 402, 408-11 (S.D.Cal.1961).

The court below found that in general there had been no negotiation in the past between the Rutland and its employees over changes in train runs. This finding was not clearly erroneous. Across the nation there seems to be no uniform pattern in this matter; some railroads have more

latitude to act unilaterally over changes of this sort than do others. See the Presidential Railroad Commission Report (Feb. 28, 1962) at 295.

In a number of cases involving disagreements similar to the one in the present case, courts have classified the disputes as minor. In the Matter of Hudson & M. R. R., 172 F.Supp. 329 (S.D.N.Y.), aff'd sub nom Stichman v. General Grievance Comm. of the Bhd. of R. R. Trainmen, 267 F.2d 941 (2 Cir., 1959), cert. denied Hatler v. Dawson, 361 U.S. 928, 80 S.Ct. 385, 4 L.Ed.2d 351 (1960), see also cert. denied, 363 U.S. 843, 80 S.Ct. 122, 4 L.Ed.2d 104 (revision of runs and use of multiple control cars reducing trainmen jobs); Norfolk & P. B. L. R. R. v. Brotherhood of R. R. Trainmen, 248 F.2d 34 (4 Cir., 1957), cert. denied 355 U.S. 914, 78 S.Ct. 343, 2 L.Ed.2d 274 (1958) (change of point for reporting to work); Missouri-K.-T. R. R. v. Brotherhood of Locomotive Engineers, 266 F.2d 335 (5 Cir., 1959), reversed on other grounds, 363 U.S. 528, 80 S.Ct. 1326, 4 L.Ed.2d 1379 (1960) (changes in intradivisional runs and away-from-home terminals); Hilbert v. Pennsylvania R. R., 290 F.2d 881 (7 Cir.), cert. denied, 368 U.S. 900, 82 S.Ct. 174, 7 L.Ed.2d 96 (1960) (reassignment of engineers from one terminal to another); Baltimore & O. R. R. v. United R. R. Workers, 271 F.2d 87 (2 Cir., 1959), vacated and remanded on other grounds, 364 U.S. 278, 80 S.Ct. 1609, 4 L.Ed.2d 1719 (1960) (abolition of post of oiler on diesel powered tugs).

In the light of the provisions of the collective bargaining agreements, the prior conduct of the parties as found by the trial judge and the decisions in analogous cases, we hold that the existing agreements involved here, reasonably interpreted, may recognize implicitly a right in the railroad unilaterally to make the changes which it bulletined on September 8, 1960; therefore, we hold that the ensuing dispute must be viewed by the courts as a minor dispute. Whether the railroad does in fact have the rights

it claims, or whether on further analysis it does not is for the Board to determine; on the *ultimate* resolution of this issue we express no opinion. We only hold that for the purpose of defining the extent to which a court may intervene and enjoin a strike the dispute in the present case is to be considered minor as one involving the interpretation of existing agreements.

Our decision is not inconsistent with the Supreme Court's holding in Order of R. R. Telegraphers v. Chicago & N. W. R. R., 362 U.S. 330, 80 S.Ct. 761, 4 L.Ed.2d 774 (1960). Besides concluding in that case that a controversy over a railroad's proposal to reduce the number of its stations was a labor dispute under the Norris-LaGuardia Act, the Court held that that disagreement between management and labor involved a bargainable issue and that the controversy was a major dispute. We do not say that the issue in the present case is not a bargainable one. We have no doubt that the brotherhoods, upon the expiration of the existing agreements, may require the railroad to bargain over future procedures for changing train runs and schedules. We only hold that there is a sufficient indication that the existing agreements have preserved management's right unilaterally to make the schedule changes management intended to make so as to require that the dispute be submitted to the National Railroad Adjustment Board, as provided by the Railway Labor Act.

We are not entirely certain what constituted the basis in the Chicago & N. W. R. R. case for the Court's other conclusion that there a major dispute existed. Cf. Hilbert v. Pennsylvania R. R., 290 F.2d 881, 895 (7 Cir.), cert. denied, 368 U.S. 900, 82 S.Ct. 174, 7 L.Ed.2d 96 (1961). Probably the Court was applying the traditional standards for distinguishing the two types of disputes, and, on the facts presented to it in that case, concluded that a major dispute was present. On a different set of facts we have

found a minor dispute here. But perhaps the Court in Chicago & N. W. R. R. was adding a new dimension to the usual criteria for distinguishing major disputes from minor ones, that of the magnitude of the effect on working conditions which would result from the proposal by the railroad. But even if the Court was adding this ingredient to its analysis, which we doubt, the controversy before us is still a minor dispute because the proposed schedule changes on the Ogdensburg Subdivision would only affect very few jobs.

The court below did not condition its issuance of the injunction against appellants on a requirement that the railroad maintain the *status quo*. It was certainly within the court's power to impose such a condition. See Brotherhood of Locomotive Engineers v. Missouri-K.-T. R. R., 363 U.S. 528, 80 S.Ct. 1326, 4 L.Ed.2d 1379 (1960); also United R. R. Workers, etc. v. Baltimore & O. R. R., 364 U.S. 278, 80 S.Ct. 1609, 4 L.Ed.2d 1719 (1960). But likewise it was in the court's discretion to decline to impose conditions. 363 U.S. at 534-535, 80 S.Ct. 1326, 4 L.Ed.2d 1379. We find no abuse by the court of its discretionary powers in this area.

Interrelation of the Railway Labor Act and the Norris-La Guardia Act

In general, the Norris-La Guardia Act, 47 Stat. 70 (1932), 29 U.S.C.A. §§ 101-115, passed in 1932, deprives federal district courts of jurisdiction to issue injunctions against strikes by employees in labor disputes, § 4(a), 47 Stat. 71 (1932), 29 U.S.C.A. § 104(a); allows injunctions to be granted against unlawful acts which will cause irreparable injury only under strict procedural requirements, § 7, 47 Stat. 71 (1932), 29 U.S.C.A. § 107; and precludes injunctive relief even when these stringent requirements are met if the complainant has failed to fulfill, on its part, its legal obligations or has failed, on its part, to make rea-

sonable attempts to settle the labor dispute by negotiation, mediation, or voluntary arbitration, § 8, 47 Stat. 72 (1932), 29 U.S.C.A. § 108. See 75 Cong. Rec. 4626, 4629 (1932); Chicago, R. I. & Pac. R. R. v. Switchmen's Union, 292 F.2d 61 (2 Cir., 1961), certiorari denied 370 U.S. 936, 82 S.Ct. 1578, 8 L.Ed.2d 806. This statute embodies a policy of fostering the resolution of labor difficulties through the interplay of private forces unhampered by judicial interference. See S.Rep. No. 163, 72d Cong., 1st Sess. 18 (1932); H.R. Rep. No. 669, 72d Cong., 1st Sess. 3 (1932). The draftsmen of the Norris-LaGuardia Act had before them the 1926 provisions of the Railway Labor Act, which included most of the present procedures for settling major disputes, the provisions for disposing of minor disputes through voluntary local boards, and Section 2 First and Second, 44 Stat. 577 (1926), 45 U.S.C.A. § 152 First and Second, which imposed on both management and labor the duty to confer over any dispute. All of these provisions channeled, but did not eliminate, the operation of private forces in the determination of labor disputes. See Brotherhood of R. R. Trainmen v. Toledo, P. & W. R. R., 321 U.S. 50, 58-59, 64 S.Ct. 413, 88 L.Ed. 534 (1944); cf. 75 Cong. Rec. 4505-10, 4618-26, 5462-515 (1932). Subsequent labor legislation, however, including the 1934 amendments to the Railway Labor Act which provided for official adjudication of certain labor disputes by the National Railroad Adjustment Board, reflected a policy of interpositioning greater governmental participation in labor relations. See Note, Accommodation of the Norris-LaGuardia Act to Other Federal Statutes, 72 Harv.L.Rev. 354, 356 (1958). To accommodate the differing policies underlying the Norris-LaGuardia Act and the Railway Labor Act is not an easy task. In Brotherhood of R. R. Trainmen v. Chicago River & Ind. R. R., 353 U.S. 30, 40, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957), the Supreme Court stated:

> "* * * the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable."

On numerous occasions courts have issued injunctions in labor disputes despite the apparently categorical language of the Norris-LaGuardia Act. In Virginian Ry. v. System Fed'n 40, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789 (1937), a labor union which had been certified by the National Mediation Board obtained an injunction against a railroad commanding the road to deal with it and not to interfere with the employees' choice of a bargaining representative. In a series of cases the Supreme Court has held that railroad unions may be enjoined from showing discrimination in their representation of railroad employees. Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187 (1944); Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232, 70 S.Ct. 14, 94 L.Ed. 22 (1949); Brotherhood of R. R. Trainmen v. Howard, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283 (1952); Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). See also Steele v. Louisville & N. R. R., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944) (arising in a state court where Norris-LaGuardia Act was inapplicable). See also Railroad Yardmasters of America v. Pennsylvania R. R., 224 F.2d 226 (3 Cir., 1953). See, generally, Chicago, R. I. & Pac. R. R. v. Switchmen's Union, supra; American Airlines, Inc. v. Air Line Pilots Ass'n, 169 F.Supp. 777, 785-787 (S.D.N.Y.1958).

In Brotherhood of R. R. Trainmen v. Chicago River & Ind. R. R., 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957), the Supreme Court held that the Norris-LaGuardia Act did not preclude a federal court from enjoining a strike

which might defeat the effectiveness of the National Adjustment Board's authority to adjudicate a minor dispute. The Court concluded first, that Congress had intended the proceeding before the Adjustment Board to be a reasonable substitute for self-help and second, that the earlier and more general language of the Norris-LaGuardia Act should give way to the later specific provisions of the 1934 amendments to the Railway Labor Act. For cases in which lower courts have enjoined strikes in such situations, see supra at p. 2092. In the present case, as in the Chicago River case, a minor dispute is involved, the railroad has submitted the matter to the Railroad Adjustment Board, and we follow the lead provided for us in that case and its progeny. We hold that an injunction is properly issuable in order to enforce compliance with the requirement of the Railway Labor Act that a minor dispute is to be heard and determined by the National Railroad Adjustment Board.[8] Cf. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457-459, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957).

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[8] In 1960 the Supreme Court again spoke on the relationship between the Norris-LaGuardia Act and the Railway Labor Act. Order of R. R. Telegraphers v. Chicago & N. W. R. R., 362 U.S. 330, 80 S.Ct. 761, 4 L.Ed.2d 744 (1960). The Court held that Section 4 of the Norris-LaGuardia Act withdrew jurisdiction from the federal court to enjoin the strike involved in that case. The Court discovered no provision of the Railway Labor Act which made the strike unlawful and concluded that there the dispute was a major one. That case is distinguishable from the present one for the labor dispute here is a minor dispute. The Supreme Court in Chicago & N. W. R. R., though holding that the strike there could not be enjoined, recognized that federal courts could enjoin strikes arising out of minor disputes. 362 U.S. at 341, 80 S.Ct. 761. Moreover, a strike which would frustrate the procedures created by the Railway Labor Act for the final determination of such disputes would be unlawful. Cf. Chicago, R. I. & Pac. R. R. v. Switchmen's Union, 292 F.2d 61 (2 Cir. 1961), certiorari denied 370 U.S. 936, 82 S.Ct. 1578, 8 L.Ed.2d 806.

But what significance for the case before us have Section 2 First, Second, and Sixth of the Railway Labor Act and Section 8 of the Norris-LaGuardia Act? Section 2 First and Second impose a duty on both parties to make every reasonable effort to settle a dispute, whether it be major or minor, and, as a part of their efforts, to confer over their differences.[9] Section 2 Sixth provides the procedure for calling a conference to discuss a minor dispute. These conferences are to take place before a submission of the dispute to the Railroad Adjustment Board. § 3 First (i), 48 Stat. 1189 (1934), 45 U.S.C.A. § 3 First (i); Elgin J. & E. Ry. v. Burley, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886 (1945); Brotherhood of R. R. Trainmen v. Chicago River & Ind. R. R., supra at 33. The present Section 2 First, Second and Sixth were already part of the Railway Labor Act when the Norris-LaGuardia Act was passed. See Railway Labor Act § 2 First, Second, Fourth, 44 Stat. 577 (1926).

Section 8 of the Norris-LaGuardia Act states:

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available

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[9] These sections provide in pertinent part:

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort * * * to settle all disputes, whether arising out of the application of such agreements or otherwise, * * *.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, and in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

governmental machinery of mediation or voluntary arbitration."

Section 8 thus imposes two different requirements on one who seeks injunctive relief in a labor dispute. He must comply with all his legal obligations relevant to the dispute and, further, he must make every reasonable effort to settle the dispute by the methods enumerated. Brotherhood of R. R. Trainmen v. Toledo, P. & W. R. R., 321 U.S. 50, 64 S.Ct. 413, 88 L.Ed.534 (1944). This is known as the "clean hands" provision of the Norris-LaGuardia Act. See 75 Cong.Rec. 5464 (1932).[10]

Since section 2 First, Second and Sixth of the Railway Labor Act were enacted before the Norris-LaGuardia Act, the rule of thumb upon which courts too often rely that the scope of earlier and more general legislation must always be reconsidered in the light of more specific provisions appearing in subsequent legislation does not help in deciding the present question. Moreover, the purpose of the Railway Labor Act, § 2 First, Second and Sixth and the purpose of the "clean hands" provision of the anti-injunction statute are not so inconsistent that it is impossible to accommodate one to the other.

In Brotherhood of R. R. Trainmen v. Toledo, P. & W. R. R., supra, the Supreme Court held that under section 8 of the Norris-LaGuardia Act a railroad was not entitled to an injunction against a strike because the road had refused to submit to voluntary arbitration, an available

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[10] The extent to which the Supreme Court has gone to enforce compliance with this provision of the Norris-LaGuardia Act is seen in Brotherhod of R. R. Trainmen v. Toledo, P. & W. R. R., 321 U.S. 50, 64 S.Ct. 413, 88 L.Ed. 534 (1944), in which the Court reversed an order granting injunctive relief to a complainant that had not complied with section 8, and this despite the fact that the acts complained of had caused violence.

method for settling the dispute there involved. In Butte A. & Pac. Ry. v. Brotherhood of Locomotive Firemen & Enginemen, 268 F.2d 54 (9 Cir.), cert. denied, 361 U.S. 864, 80 S.Ct. 122, 4 L.Ed.2d 104 (1959) (alternative holding) the Court of Appeals for the Ninth Circuit held that an anti-strike injunction had to be denied under the Norris-LaGuardia Act because the railroad had abandoned the procedures of the Railway Labor Act for settling the major dispute in that case. Although both of these cases involved major disputes, we believe their treatment of the relationship between section 8 of the Norris-LaGuardia Act and the procedures set up by the Railway Labor Act for settling railway labor disputes is applicable to the case before us. See Butte A. & Pac. Ry. v. Brotherhood of Locomotive Firemen & Enginemen, supra, at n. 10. Cf. East Texas Motor Freight Lines v. International Bhd. of Teamsters, 163 F.2d 10 (5 Cir., 1947).[11]

Reading the relevant sections of the Railway Labor Act together with the "clean-hands" provision of the Norris-LaGuardia Act, and remembering that the dispute here is a minor dispute, we observe that an applicant for an injunction (1) must comply with all legal obligations required of it including the making of every reasonable effort to settle the dispute by conference and (2) must make every reasonable effort to settle the dispute by nego-

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[11] In Chicago, R. I. & Pac. R. R. v. Switchmen's Union, 292 F.2d 61, 66 (2 Cir. 1961), certiorari denied 370 U.S. 936, 82 S. Ct. 1578, 8 L.Ed.2d 806, it was suggested that a union which failed to comply with the Railway Labor Act, § 2 First, Second might be subject to an anti-strike injunction. The present case involves the converse situation. The railroad, perhaps, has failed to comply with those provisions, and, therefore, under § 8 of the Norris-LaGuardia Act, if its failure is shown, it may be deprived of injunctive relief as long as it continues in its dereliction. See also Long Island R. R. v. Brotherhood of R. R. Trainmen, 185 F.Supp. 356 (E.D.N.Y. 1960).

tiation.[12] We are not certain whether the draftsmen intended different concepts by the words "conference" and "negotiation." See Brotherhood of R. R. Trainmen v. Toledo, P. & W. R. R., supra, 321 U.S. at 61, 64 S.Ct. 413, 88 L.Ed. 534. However, we find that in applying these terms to the present controversy a distinction should be drawn between the duty to negotiate and the duty to confer. We construe "negotiation" to mean full-scale discussion and disputation. We construe "conferring" to mean activity of a similar type to negotiation but activity requiring a lesser output of time and of energy. We must make this distinction in the present case because of the nature of the issue which divides the parties. The basic dispute is whether the railroad under its existing agreement must *negotiate* before it reschedules the runs on the Ogdensburg Subdivision. If the railroad were required by statute to negotiate this issue before it submitted the dispute to the Adjustment Board, the result would be to require the railroad to negotiate with employee representatives over whether it should negotiate with them—a solution sounding a lot like an exercise in theoretical logic. We think in practice it would be virtually impossible for the parties to negotiate whether they would negotiate about the rescheduling without actually negotiating about the rescheduling itself. Thus the brotherhoods would immediately achieve what they are only entitled to obtain after adjudication of the dispute by the Railroad Adjustment Board. Therefore, we hold that any requirement in section 8 of the Norris-LaGuardia Act that a railroad negotiate before obtaining an injunction is superseded by the statutory scheme in the Railway Labor Act that gives the Adjustment Board the power to decide whether there should be any negotiation at all between management and the brotherhoods.

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[12] Mediation and voluntary arbitration are only relevant for major disputes.

But in minor disputes involving the scope of the managerial prerogative it must be that Section 2 First, Second and Sixth of the Railway Labor Act together with the Norris-LaGuardia Act impose some lesser duty on a railroad which seeks injunctive relief. Otherwise, in any minor dispute in which a railroad can contend that the question is one committed to managerial prerogative, the railroad will be tempted not to try to reach a private understanding with the representatives of its employees, a result inconsistent with one of the fundamental policies of the Railway Labor Act. See Brotherhood of R. R. Trainmen v. Toledo, P. & W. supra; Gunther v. San Diego & Ariz. E. Ry., 198 F.Supp. 402 (S.D.Cal.1961). Therefore, we hold that the relevant sections of the Railway Labor Act and the Norris-LaGuardia Act impose a duty upon a railroad, short of negotiation, to take some reasonable steps toward dispute settlement before it can obtain an anti-strike injunction. These lesser efforts are comprehended within the concept of "conferring." It is not easy to state exactly what the railroad must do in cases in which it must confer but need not negotiate. In each case the district judge must apply his experience and good sense to the specific circumstances of the case. However, certain minimum steps can be suggested for the usual case. Unfair surprise should be avoided whenever possible. The representatives of management should meet with those of labor. Each side should listen to the contentions of the other side and each side should explain its position clearly and honestly, but not for as long a time as is customary in full-scale bargaining. In short, men of good faith must in good faith get together in a sincere effort to resolve their differences. Cf. Brotherhood of R. R. Trainmen v. Toledo, P. & W. R. R., at n. 18; Brotherhood of Ry., etc. Clerks v. Atlantic Coast L. R. R., 201 F.2d 36, 40 (4 Cir.), cert. denied, 345 U.S. 992, 73 S.Ct. 1131, 97 L.Ed. 1400

(1953); American Airlines, Inc. v. Air Line Pilots Ass'n, 169 F.Supp. 777 (S.D.N.Y. 1958); Long Island R. R. v. Brotherhood of R. R. Trainmen, 185 F.Supp. 356 (E.D.N.Y. 1960). See also N. L. R. B. v. Wooster Division of Borg-Warner Corp., 356 U.S. 342, 78 S.Ct. 718, 2 L.Ed.2d 823 (1958); N. L. R. B. v. Truitt Mfg. Co., 351 U.S. 149, 76 S.Ct. 753, 100 L.Ed. 1027 (1956); N. L. R. B. v. Insurance Agents' International Union, 361 U.S. 477, 80 S.Ct. 419 L.Ed.2d 454 (1960).

In the present case the district court made no finding whether the management of the railroad made the good faith efforts which we have held to be a prerequisite to the obtaining by it of injunctive relief. The telegram that the railroad sent to the brotherhoods on September 15 stated "Conferences on this issue have not been held on the property with the [brotherhoods]." However, the railroad claimed at the hearing that its representatives met with representatives of the brotherhoods on September 9 and on September 16. We cannot determine from the record alone, without the benefit of observing the witnesses, whether the extent of these discussions met the standard we find is imposed by the Railway Labor Act.

If in fact the railroad has failed to take the steps required of it by the Railway Labor Act, it is not entitled to injunctive relief against the strike of its employees. Butte, A. & Pac. Ry. v. Brotherhood of Locomotive Firemen, 268 F.2d 54 (9 Cir.), cert. denied, 361 U.S. 864, 80 S.Ct. 122, 4 L.Ed.2d 104 (1959). Therefore, we must remand the case for the district court to determine whether the railroad made reasonable efforts to settle this dispute in conference. See Pennsylvania R. R. v. Transport Workers Union, 178 F.Supp. 30 (E.D.Pa.1957) (Finding No. 15), appeal dismissed, 3 Cir., 278 F.2d 693 (1960). If

the district court finds that the railroad has not done so, it should not issue the injunction until the railroad has perfected its right to such relief by compliance with its statutory obligation.

We believe that this disposition accommodates the purposes of both statutes. Except for the creation of the Railroad Adjustment Board, the policy behind both statutes is to facilitate the private settlement of labor disputes, see Brotherhood of R. R. Trainmen v. Toledo, P. & W. R. R., 321 U.S. 50, 58, 64 S.Ct. 413, 88 L.Ed. 534 (1944); Dwellington v. Thompson, 91 F.Supp. 787 (D.Mo.1950), aff'd sub nom. Rolfes v. Dwellington, 8 Cir., 198 F.2d 591 (1952). Furthermore, it cannot be said that this result subverts the jurisdiction of the National Railroad Adjustment Board because efforts privately to settle a dispute are required by the Railway Labor Act itself before submission of the dispute to the Adjustment Board.

Our decision is consistent with the Supreme Court's ruling in Brotherhood of R. R. Trainmen v. Chicago River & Ind. R. R., supra. In that opinion, especially at footnote 24, the Court concluded that because the Railway Labor Act created the Railroad Adjustment Board to decide the merits of minor disputes with finality, Section 8, like the other provisions of the Norris-LaGuardia Act, did not bar injunctive relief. But the Court did not address itself to the relationship of section 8 to those provisions of the Railway Labor Act which, without regard to the type of dispute involved call for private conference in an effort to adjust the differences between the parties prior to governmental intervention. Therefore, that decision is not relevant to this part of our opinion. See discussion in Chicago R. I. & Pac. R. R. v. Switchmen's Union, supra.

at 66, as to the scope of the decision in the Chicago River & Ind. R. R. case.[13]

Reversed and remanded for further proceedings not inconsistent with this opinion.

MARSHALL, Circuit Judge (dissenting).

With deference to my brothers, I deem the issues raised by the present case to be of such importance that a statement of my dissenting views is necessary. Because the "Section 6" and contract termination notices served by Rutland were also issued by most of the Class I railroads in the country, the factual pattern before us is of national importance. Much of what the majority says seems to me not only well put but also quite correct. I do not disagree with their treatment of the venue problem, with most of their general statements as to when a strike is legal or illegal under the Railway Labor Act, or with the assertion that a "labor dispute" is involved in this case. I strongly disagree, however, with the result they reach and would suggest that much of what they say is actually inconsistent with that result.

The majority correctly states the principal issue to be whether the dispute between the parties was "major" or "minor" under the Railway Labor Act. That proposition, however, is of such generality that it fails to pose the problems we must solve in any meaningful fashion. The legal dispute here involves two questions. First, what procedures must a party to a collective agreement in the railroad in-

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[13] The defendants also assert that the railroad is not entitled to an injunction because it has not complied with the non-statutory duty of clean hands imposed on all who seek to invoke the jurisdiction of a court of equity. We believe that in the present case the scope of this non-statutory obligation is no greater than the statutory obligation imposed by Section 8 of the Norris-LaGuardia Act.

dustry follow in order to terminate that agreement or any part thereof?[1] Second, the termination having been accomplished, under what circumstances may the parties resort to economic force?

My position, briefly summarized, is that Rutland voluntarily terminated so much of the collective agreement as might be said to govern the establishment of new runs and the merging or elimination of crew terminals and, then, believing that it could not secure what it desired through the normal processes of collective bargaining, violated the plain mandates of the Railroad Labor Act's major dispute procedures by unilaterally changing certain runs and terminals. This action should have been enjoined by the District Court. It does not follow that a strike to prevent such changes was justifiable, however, since, in my view at least, a remedy in the courts was available to the union and should have been resorted to. I would, therefore, have enjoined both Rutland and the Brotherhoods from engaging in self-help until exhaustion of the major dispute procedures.

The majority's conclusion is radically different. They hold explicitly that the agreement insofar as it dealt with the establishment of runs and terminals was not terminated and *sub silentio* that there was in fact no way in which to terminate it. They enjoin the union's use of economic force, therefore, pending exhaustion of the drawn-out minor dispute procedures and leave Rutland free to act unilaterally.

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[1] This seems to me to be the principal issue in the case since I would agree that if the revelant contractual provisions had not been terminated, the decision would be clearly governed by Brotherhood of R. Trainmen v. Chicago R. & I. Ry., 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957).

The words "major" and "minor" have no intrinsic legal significance. They are derived from the terminology of railway industrial relations and are used judicially merely as a shorthand way of referring to a distinction incorporated in the structure of the Railway Labor Act. The statute, itself, however, does not use the words. The distinction is of legal significance solely because the Act establishes mutually exclusive mandatory procedures to be followed in resolving two different kinds of disputes.

Disputes involving grievances or contract interpretation questions are to be handled under Section 3 First.[2] Under that provision either party may submit the dispute to the appropriate Adjustment Board for a "final and binding" decision on the meaning of the contract. A strike over disputes properly submitted to the Adjustment Board may be enjoined in order to protect the Board's jurisdiction. Brotherhood of R. Trainmen v. Chicago River & Ind. R. Co., 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957). And, in appropriate circumstances, the enjoining court may condition the strike injunction upon preservation of the *status quo* by management pending final adjudication by the Board. Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. Co., 363 U.S. 528, 80 S.Ct. 1326, 4 L.Ed.2d 1435 (1960).[3]

But labor contracts in the railroad industry do not continue in force *in perpetuum* unless both parties so desire. Like many familiar agreements, they are subject to termi-

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[2] 45 U.S.C.A. § 153 First.

[3] Even though the majority believes a minor dispute is involved, it does not discuss the applicability of that decision to this case. Since I cannot agree this is a minor dispute, I shall also forgo discussion.

nation and change, a process which, when invoked by a party,[4] is characterized as a major dispute.

While the Act provides for compulsory arbitration of minor disputes, it leaves the resolution of major disputes to free collective bargaining and the use of economic force subject only to certain mandatory procedural requirements. Section 6[5] governs the procedure to be followed in changing agreements affecting working conditions. Any party desiring such a change must give 30 days written notice to the other party. Either party may then request the services of the Mediation Board or the Board may step in on its accord under Section 5.[6] Under Section 6 "rates of pay, rules, or working conditions shall not be altered" until final action by the Mediation Board under Section 5. Section 5 prohibits changes in "rates of pay, rules, or working conditions or established practices" until 30 days after the Board has notified the parties of the failure of its mediatory efforts. Section 10[7] empowers the President to establish an emergency board after the failure of mediation efforts and provides "no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose" until thirty days after the Board makes its report to the President. The legislative history indicates that when the rail unions and carriers agreed upon these provisions, the unions surrendered their right to strike pending exhaustion of major dispute pro-

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[4] Presumably, a palpable breach of contract would be in violation of Section 6, see note 5, infra, and accompanying text, which requires 30 days written notice of an intended change in agreements and would therefore also create a major dispute. Cf. Railroad Yardmasters of America v. Pennsylvania R. Co., 224 F.2d 226 (3 Cir. 1955).

[5] 45 U.S.C.A. § 156.

[6] 45 U.S.C.A. § 155.

[7] 45 U.S.C.A. § 160.

cedures in exchange for a statutory provision restraining management from disturbing the *status quo*.[8] These "freeze"[9] or "cooling-off"[10] provisions have been held to be enforceable by the courts. Grand International Brotherhood, etc. v. Morphy, 109 F.2d 576 (2 Cir., 1940); cert. denied 310 U.S. 635, 60 S.Ct. 1078, 84 L.Ed. 1404 (1940); Railroad Yardmasters v. Pennsylvania R. Co., 224 F.2d 226 (3 Cir., 1955).

No provision is made, however, for the compulsory resolution of substantive issues in major disputes, and the parties are free to resort to economic force after exhausting the procedures. Chicago River, supra, at fn. 24; Order of R. Telegraphers v. Chicago & N. W. R. Co., 362 U.S. 330, 80 S.Ct. 761, 4 L.Ed.2d774 (1960). See also Chicago, Rock Island and Pac. R. Co. v. Switchmen's Union, 292 F.2d 61 (2 Cir., 1961).

Within this legal framework, I fail to grasp how the factual pattern here presents the difficulties encountered by the majority. On November 2, 1959, Rutland served notice on the Brotherhoods "under our existing agreements and pursuant to the provisions of the Railway Labor Act" that it wanted a new contract, "effective January 1, 1960," which would in effect eliminate all "agreements, rules, regulations, interpretations and practices, however established," restricting the carrier's right to establish new runs and which would also explicitly "[e]stablish a rule to provide that * * * [t]he carrier shall have the right to establish, move, consolidate and abolish crew terminals * * * with the right to operate

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[8] 67 Cong.Rec. 4524, 4588. See also comment, Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes, 60 Colum.L.Rev. 381, 388 (1960).

[9] Chicago, Rock Island & Pac. R. Co. v. Switchmen's Union, 292 F.2d 61, 66 (2 Cir. 1961).

[10] 67 Cong.Rec. 4648, 4650.

any * * * run * * * through established crew terminals." This was a 30 day notice of termination of all contractual provisions, explicit or implied, relating to the establishment of new runs and crew terminals. Rutland, by thus invoking Section 6 of the Act, and the termination provisions of the contracts, notified the Brotherhoods that it desired not only to terminate all restrictive provisions, practices and even all ambiguities as to the establishment of new runs but also that it wanted an explicit provision incorporated in a new agreement which would bestow upon it the absolute prerogative to change crew terminals. Rutland thereby voluntarily terminated the old agreement to this extent and invoked the major dispute procedures. Having invoked them, presumably it was bound by them.

Nevertheless, on September 8, 1960, before exhaustion of the major dispute procedures, Rutland announced that it intended unilaterally to establish new runs thereby changing certain crew terminals and to operate these runs through other established terminals. Since the major dispute procedures require that the carrier not change "working conditions," "established practices," or the "conditions out of which the dispute arose" until their exhaustion, Rutland's action was a plain violation of the Railway Labor Act.[11]

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[11] Arguably, these provisions might be read merely to mean that the collective agreement, with all its ambiguities, is to remain in force pending exhaustion of the major dispute procedures. Under that view, minor disputes could occur during that period and might involve the subject matter of the major dispute. In such a case, however, the union would still be free to strike over the issue after exhaustion of the major dispute procedures. A contrary holding would mean that ambiguous terms in a collective agreement would not be subject to change through collective bargaining until their meaning had been determined by the Adjustment Board. This would effectively lengthen the term of the contract beyond the intentions of the parties and would prohibit clarification through

The Brotherhoods called a strike because of the unilateral changes announced by Rutland and were enjoined by the District Court.

In reviewing that action, I should have thought the principal question would be whether the union was free to strike against Rutland's illegal actions or whether the conduct of both parties in derogation of the major dispute procedures must be enjoined. On balance, I would have adopted the latter course both on the grounds that resort to the courts is generally preferable to this kind of self help[12] and on the further grounds that the "cooling off" policies of the major

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collective bargaining of those contractual provisions which need it most. It would, moreover, seem directly contrary to the intent of Section 6 which contemplates the proposal of changes in agreements whenever the parties desire and which contains no provisions restraining its use until an Adjustment Board decision has been rendered on the meaning of the old contract.

In any case, the preferable view is that changes in existing conditions which are the subject of a major dispute are forbidden whether or not they are arguably authorized by the collective agreement. The "freeze" provisions carefully avoid reference to the collective agreement, but emphasize "working conditions" (Section 6), "established practices" (Section 5), and "conditions out of which the dispute arose" (Section 10). This is in contrast to other parts of the Act, and, indeed, Section 6 itself, which refer directly to the "agreement" when necessary. Moreover, the legislative history of the statute shows the "freeze" provisions were intended to enforce a "cooling off" period upon both labor and management in the railroad industry. See Note 10, supra. But this policy cannot be effectuated if management is allowed to take advantage of an ambiguous contract during the "freeze" to make changes in working conditions relating to the dispute. Such action is far more likely to warm up the dispute than cool it off.

[12] Cf. Bakery Sales Drivers Local 33, v. Wagshal, 333 U.S. 437, 68 S.Ct. 630, 97 L.Ed. 79 (1948); Dorchy v. Kansas, 272 U.S. 306, 47 S.Ct. 86, 71 L.Ed. 248 (1926); but see Mastro Plastics Corp. v. N. L. R. B., 350 U.S. 270, 76 S.Ct. 349, 100 L.Ed. 309 (1956).

dispute procedures cannot be effectuated by allowing both parties simply to do away with the Act. These problems have become irrelevant, however, for the majority has concluded that the dispute is minor and must be resolved by an Adjustment Board determination of the meaning of the old agreement.

One reason asserted by the majority in support of this result seems to be that the Section 6 notice was not sufficiently broad to cover the matters in dispute. Two quotations from the notice are set out, apparently only to do away with restrictions on the managerial prerogative to establish new runs. The majority then finds there are no *explicit* restrictions in the agreements, and, therefore, the Section 6 notice does not encompass this dispute. But if all this is true, why did Rutland serve notices pursuant to Section 6 and the various contracts in the first place? Plainly, Rutland's purpose was to eliminate the ambiguities[13] in the agreement which the majority admits exist and in fact relies upon in sending this case to the Adjustment Board. I have not found any language in the statute or policy behind it which would prohibit or nullify this use of Section 6 in the manner suggested by the majority. I believe that clarification through collective bargaining of ambiguous contractual provisions is a most laudable purpose and should be encouraged rather than hampered by the courts. Moreover, the majority inexplicably ignores paragraph B(1) of the notice. That paragraph explicitly notifies the unions that Rutland

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[13] Existing ambiguities in a document cannot be cured by the continued silence of the parties. Obviously, therefore, Rutland's notice contemplated insertion of new provisions which would either affirmatively establish its prerogatives or would direct the Adjustment Board to follow a rule of construction which would prevent "interpretations" from infringing on these rights. Either course would require a new provision and a "change" in the existing agreements.

seeks to "Establish a rule to provide that * * * 1. The Carrier shall have the right to establish, move, consolidate and abolish crew terminals * * *". Surely a request to incorporate a comprehensive clause such as this must be said to change an ambiguous contract or an agreement containing no such explicit provision. That paragraph B(1) encompasses the dispute here is plainly evident, for the majority itself states the present "disagreement * * * [is] whether the management of the railroad had the right to * * * change crew terminals."

The majority states the "major-minor" distinction in the following fashion:

> "It is a major dispute if the present agreements between the railroad and the brotherhoods contain express provisions contrary to the position taken by the railroad or if the clear implication of these agreements is inconsistent with the railroad's proposals. It is a minor dispute if there is a clearly governing provision in the present agreements, although its precise requirements are ambiguous; * * *."

While this might be a correct statement of the law in the absence of a Section 6 notice, I would suggest that it is entirely erroneous once such a notice has been served. The majority opinion itself at one point concedes that major disputes commence with notice under Section 6. Moreover, it must be so, for under the Railway Labor Act a party is free to terminate an ambiguous contract in the hope of making it explicit without going to an Adjustment Board for a determination of its meaning. This is precisely what Rutland attempted to do. The reliance placed by Rutland and the majority upon the collective agreement is utterly inconsistent with the Section 6 notice, for Rutland intended by that notice to terminate and do away with the very same contractual provisions which are now so strenuously relied upon. And, the inconsistency of relying on these

provisions is magnified since the notice was also based upon the termination clauses of the same agreements. I dare say that if this were a commercial contract with a 30 day termination provision, we would not show such solicitude for one who invoked the termination procedures but later claimed the agreement was still in effect when the other party refused to meet his demands for a new contract.

But the significance of today's decision transcends the immediate and hopefully temporary problems of the Rutland Railroad and its employees. There is much in the majority opinion which implies there cannot be a major dispute if the relevant agreement contains an "ambiguous," but "clearly governing", provision, regardless of whether a Section 6 notice has been served. The quotation in the preceding paragraph seems to be to that effect. Along the same lines, reliance is placed upon "a number of cases involving disagreements similar to the one in the present case, [in which] courts have classified the disputes as minor." In all but one, however, there was no effective Section 6 notice and, therefore, no effective termination of the agreement.[14] The Railway Labor Act establishes a

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[14] In the Matter of Hudson & M. R. Co., 172 F.Supp. 329 (S.D. N.Y.1959), aff'd per curiam sub nom. Stichman v. General Grievance Comm. of the Bhd. of R. Trainmen, 267 F.2d 941 (2 Cir. 1959) cert. denied 363 U.S. 843, 80 S.Ct. 1608, 4 L.Ed.2d 1727 (1960) (proposal to amend the agreement withdrawn); Norfolk & P.B.L.R. v. Brotherhood of R. Trainmen, 248 F.2d 34 (4 Cir. 1957) cert. denied 355 U.S. 914, 78 S.Ct. 343, 2 L.Ed.2d 274 (1958) (no section 6 notice); Missouri-Kansas-Texas R. Co. v. Brotherhood of Locomotive Engineers, 266 F.2d 335 (5 Cir. 1959) rev'd on other grounds 363 U.S. 528, 80 S.Ct. 1326, 4 L.Ed.2d 1379 (1960) (no section 6 notice); Baltimore & O. R. Co. v. United R. Workers, 271 F.2d 87 (2 Cir. 1959) vacated and remanded on other grounds 364 U.S. 278, 80 S.Ct. 1609, 4 L.Ed.2d 1719 (1960) (no section 6 notice). Of the cases cited by the majority, only Hilbert v. Pennsylvania R. Co., 290 F.2d 881 (7 Cir. 1961) cert. denied 368 U.S. 900, 82 S.Ct.

system of free collective bargaining, Section 6 being an integral part of that system. It is designed to allow either party to terminate an agreement, whether or not its meaning is clear, and bargain freely over new provisions subject only to certain procedural requirements. To hold that Section 6 is rendered inoperative if there is an ambiguous, but clearly governing, provision in the present agreements is to give it an effect precisely opposite to that intended and to deprive the parties of their right to bargain freely.

The dilemma created by the majority opinion is neatly posed when it says, "[T]he brotherhoods, upon the expiration of the existing agreements, may require the railroad to bargain" over the issues in dispute. But the only manner in which the existing agreements may "expire" is through notice pursuant to Section 6 by one of the parties, since none of these contracts contains a fixed expiration date.[15] Presumably, if the union had, on November 2, 1959, issued a Section 6 notice stating its desire to "eliminate all agreements, rules, regulations, interpretations and practices, however established, *allowing* the carrier to establish new runs *without the union's consent*," and to "establish a rule that the carrier shall *not* have the right to establish, move, consolidate crew terminals or to oper-

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174, 7 L.Ed.2d 96 (1960) involved a Section 6 notice. I would submit that decision is erroneous.

The majority omits one decision involving a dispute "similar to the one in the present case." Order of R. Telegraphers v. Chicago & N. W. R. Co., 363 U.S. 330, 80 S.Ct. 761, 4 L.Ed.2d 774 (1960). A Section 6 notice *was* involved in that case, and the Supreme Court found it to be a major dispute. See Note 18, infra, and accompanying text.

[15] Each contract provided that it was to remain in effect until changed in accordance with the Railway Labor Act. The thrust of the majority's decision, therefore, is to eliminate the possibility of termination and to restrict the freedom of the parties to bargain collectively.

ate any runs through established crew terminals, *without the union's consent*" the majority's ruling would not vary.[16] Yet that is not significantly different from Order of R. Telegraphers v. Chicago & N. W. R. Co., 363 U.S. 330, 80 S.Ct. 761, 4 L.Ed.2d 774 (1960), in which the Supreme Court held that a major dispute existed. While the majority is "not entirely certain" as to the basis of that decision, I would submit the governing consideration must have been the Section 6 notice.[17] Otherwise, the case would have been indistinguishable from the Court's decision in Chicago River, supra, and all the other cases which have followed it. E. g. cases cited in note 14, supra. The most profitable inquiry for the majority is not how to distinguish Chicago and N. W. Ry. from this case but how to distinguish it from all the cases finding minor disputes. Viewed from that perspective, the "uncertainty" vanishes. In any case, Butte, A. & Pac. Ry. v. Brotherhood of Locomotive Firemen, 268 F.2d 54 (9 Cir. 1959), cert. denied, 361 U.S.

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[16] Since there is no explicit grant to the carrier of these rights and there is an ambiguous, but clearly governing, provision, the majority's criteria for determining that a minor dispute exists would be satisfied. Surely the fact that the carrier gave the notice here does not serve to distinguish the two cases. That factor, if anything, would help the brotherhoods.

[17] The majority is correct in stating that the magnitude of the effect upon working conditions is not the governing factor. The statute itself does not use the words major and minor and, therefore, provides no standards for judging the magnitude. Adoption of such a test would engulf us in sterile inquiries such as when does a little dispute on a big railroad become a big dispute on a little railroad. On the one hand, it might tip the tactical balance by allowing management the protection of the equity arm of the federal courts so long at it bit off a little at a time and did not attempt to get everything in one gulp. On the other hand, a literal application of major and minor might encourage the unions to strike over every dispute simply to show how big it was.

864, 80 S.Ct. 122, 4 L.Ed.2d 104 (1959) is precisely on point and explicitly supports my view of the statute. I do not grasp how it may be disposed of simply by asserting the facts are different.[18] As for Hilbert v. Pennsylvania R. Co., 290 F.2d 881 (7 Cir., 1961), cert. denied, 368 U.S. 900, 82 S.Ct. 174, 7 L.Ed.2d 96 (1961), relied on by the majority, I would decline to follow it since it also seems based on the erroneous notion that Section 6 is inoperative when the existing agreement is ambiguous

My reading of the statute and of subsequent judicial interpretations leads me to believe the majority has adopted a view which does much violence not only to our policies of free collective bargaining but also to traditional notions of freedom of contract. I must, therefore, dissent.

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[18] Butte differs from our ruling in Stichman, note 14 supra, as to the effect of a withdrawal of a Section 6 notice. The notice here, however, was not withdrawn.

[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 794

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *Petitioner,*

v.

BROTHERHOOD OF RAILROAD TRAINMEN and R. E. CARROLL, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court (R. 77-81), entered on March 8, 1965, and the Order of Judgment of the District Court (R. 81, 82), entered on March 16, 1965, are not reported. The opinion of the Court of Appeals for the

Tenth Circuit, entered on September 21, 1966, is reported at 367 F.2d 137 and is reproduced in Appendix A to the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

In the opinion of respondents the petition raises the following questions:

1. Did the Court of Appeals properly determine that the amended complaint did not meet the venue requirements of Section 1391(b) of Title 28 of the United States Code in a damage suit brought by a carrier in the judicial district of Colorado (a) against individual employees of the carrier who are residents of both the judicial district of Colorado and the judicial district of Utah and the unincorporated labor organization, of which such individuals were members, whose headquarters and principal place of business is in Cleveland, Ohio, and (b) the case was handled on behalf of the plaintiff carrier by attorneys from Chicago, Illinois, while the principal witness in support of the plaintiff's case was from Dearborn, Michigan, far removed from the judicial district in which the case was brought?

2. Did the Court of Appeals err in holding that there was no basis for liability against an individual for alleged damages growing out of a strike based upon the Court's findings that the individual was chairman of a grievance committee of local union lodges on the property of the plaintiff carrier and that his only role in connection with the strike was to send to the carrier notice of the strike decision by the national union and to thereafter advise the local unions of the issuance of a Federal court restraining order?

STATUTE INVOLVED

This petition involves provisions of Title 28, Section 1391 of the United States Code (28 U.S.C.A., Section 1391). These provisions are quoted in Appendix A hereto.

STATEMENT

The petition represents the latest step in lengthy litigation growing out of violations by the petitioner Denver and Rio Grande Western Railroad Company ("Rio Grande") in 1952 of provisions of collective bargaining agreements between that carrier and the Brotherhood of Railroad Trainmen ("Brotherhood") and the efforts thereafter of the Brotherhood to correct such violations and to obtain compensation for the carrier employees affected.

The first violation involved unilateral action by the carrier in abolishing freight assignments in the State of Utah and substituting therefor new and different assignments without consultation, negotiation, or agreement with the Brotherhood, as the collective bargaining agreement required. On February 3, 1952, the Brotherhood submitted the dispute growing out of the carrier's action to the First Division of the National Railroad Adjustment Board. On December 17, 1959, the Board issued its Award No. 19372, in which the Board found that the carrier had violated the collective bargaining agreement and sustained the claims of individual employees involved for compensation for such violation.[1] The Rio Grande refused to comply with the money award of the Board. Moreover, the Rio Grande did nothing to correct the contract viola-

[1] Volume 142 of the Printed Reports of the First Division of the National Railroad Adjustment Board, page 665.

tion found by the Adjustment Board.[2] This refusal of the carrier to accept the decision of the Adjustment Board with respect to the interpretation and application of the collective bargaining agreement was not legally justified and was itself a violation of the provisions of Section 3, First of the Railway Labor Act. *Gunther* v. *San Diego & Arizona Eastern Ry. Co.*, 382 U.S. 257.

The second contract violation by the Rio Grande also originally took place in 1952 and continued over a period of approximately eight years. The contract violation involved action of the carrier in requiring the crews of incoming freight trains at its North Denver Yard to perform work outside of the scope of the applicable collective bargaining agreements without compensation therefor. The Brotherhood also submitted this dispute to the First Division of the National Railroad Adjustment Board on or about February 2, 1953. On January 20, 1960, the Board issued its Award No. 19389, in which it found that the Rio Grande had violated the contract and directed it to pay compensation to the employees who had been illegally required to perform the work involved.[3] The carrier refused to pay the employee claims which the Board thus sustained (R. 81).

Thereafter, the Brotherhood conducted a strike against the Rio Grande on May 16, 1960, because of

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[2] The facts concerning the carrier's violation of the agreement and the Adjustment Board award are set forth in *Brotherhood of Railroad Trainmen, et al.* v. *Denver & R. G. W. R. Co.*, 338 F. 2d 407, *cert. den.* 380 U.S. 972.

[3] Award No. 19389 is reported in Vol. 142 of the Printed Reports of the First Division of the National Railroad Adjustment Board, page 858.

its refusal to put such awards into effect (R. 68, 69, 73, 75). At that time, no Federal court had held that a strike under these circumstances was illegal. The Rio Grande immediately sought and obtained an ex parte restraining order. The Brotherhood promptly moved to call off the strike which lasted approximately eight hours (R. 78, 79, 94). Thereafter, the Brotherhood did not renew the strike or threaten to do so (R. 94). The strike was decided upon by the Brotherhood and respondent Carroll's only connection therewith was to send to the carrier notice of the Brotherhood decision and to immediately advise local units of the Brotherhood of the issuance of the restraining order (R. 77-80, 92-94, 157).

The District Court ultimately held that the Brotherhood did not have a right to strike under the circumstances and permanently enjoined such a strike. *Denver & R. G. W. R. Co.* v. *Brotherhood of Railroad Trainmen, et al.*, 185 F. Supp. 369 (1960). This decision was affirmed by the Court of Appeals for the Tenth Circuit, *Brotherhood of Railroad Trainmen, et al.*, v. *Denver & R. G. W. R. Co.*, 290 F.2d 266 (1961), *cert. den.* 366 U.S. 966. It was not until three years later that this Court for the first time ruled on the right of a railway labor organization to conduct a strike under such circumstances. *Brotherhood of Locomotive Engineers* v. *Louisville and Nashville R. Co.*, 373 U.S. 33 (1963).

The Brotherhood subsequently brought actions in the United States District Court for the District of Colorado to enforce the Adjustment Board awards. The petition to enforce Award No. 19372 was filed on December 15, 1961. On September 3, 1963, the District Court entered its opinion finding that the carrier had

violated the applicable collective bargaining agreement by unilaterally abolishing and changing the freight assignment involved without negotiation or consultation with the Brotherhood, but reduced the amount of the award to the nominal sum of $1.00 per day for each claim filed by applying common law contract principles. On November 1, 1963, the District Court entered its final judgment and order in accordance with such findings. The Court of Appeals for the Tenth Circuit affirmed this decision. *Brotherhood of Railroad Trainmen* v. *Denver & R. G. W. R. Co.*, 338 F.2d 407 (1964), *cert. den.* 380 U.S. 972.

The petition to enforce Award No. 19389 was filed in the United States District Court for the District of Colorado on January 15, 1962. The District Court on April 19, 1965, found that the Rio Grande had violated the applicable collective bargaining agreements by requiring the train crews to perform the work involved but again reduced the amount of the Adjustment Board award to $1.00 per day for each claim. This decision is now before the Court of Appeals for the Tenth Circuit on cross-appeals by the Brotherhood and the individual claimant employees and by the Rio Grande. The cause was argued on May 20, 1966. Subsequently, on or about August 8, 1966, the Court of Appeals requested the parties to submit supplemental briefs concerning the effect of Public Law 89-456 (80 Stat. 208) on the appeals. This law makes Adjustment Board awards final and binding and subject only to limited court review.

The damage claim of the Rio Grande, which is the subject of the present petition, was originally filed as counterclaims to the petitions of the Brotherhood and the individual employees to enforce the two Adjustment Board awards. On motion of the Brotherhood the

counterclaims were dismissed by the District Court on the ground that they were not proper counterclaims under Section 3, First (p) of the Railway Labor Act, under which the petitions to enforce the Adjustment Board awards were filed. *Brotherhood of Railroad Trainmen* v. *Denver & R. G. W. R. Co.*, 31 F.R.D. 297 (1962). Thereafter, the carrier filed a separate action in the United States District Court for the District of Colorado (Civil Action No. 7800), asking for damages from the Brotherhood for alleged injuries suffered as a result of the strike of May 16, 1960 (R. 1-3). The Brotherhood filed a motion to dismiss the action on the grounds of improper venue or in lieu thereof to quash the return of service on the grounds that the Brotherhood had not been properly served with process (R. 4). The Rio Grande then filed an amended complaint in which respondent Carroll and the local chairmen of the Brotherhood local lodges on the property of the carrier were added as parties defendant (R. 6-8). The Brotherhood, et al., responded with a motion to strike or dismiss the amended complaint on various grounds, including (1) that it did not set forth a cause of action against respondent Carroll or the local chairmen named therein, and (2) that the complaint could not properly be brought in the District Court for the District of Colorado under Title 28, Section 1391(b), of the United States Code. This motion was denied (R. 11).[4]

When the complaint came on for trial before the District Court, the Rio Grande did not allege that it had suffered any damage during the eight-hour period of the strike as a result of the cancellation or delay in the operation of any of its passenger or freight services. All passenger and freight trains scheduled to

[4] Contrary to the assertion of the petition (page 6) the District Court gave no reason for its denial of the motion (R. 11).

operate on May 16, 1960, did, in fact, operate although delayed (R. 14-16, 79). The only damage claimed by the Rio Grande at the trial was the alleged loss of revenue to the carrier from shipments it claimed were diverted by various shippers, principally the Ford Motor Company, during the period of May 19, 1960, to June 1, 1960 (R. 17, 18, 75-80, 159, 169, 170-173). During this period, there was no strike nor any threat of a strike (R. 94). The Brotherhood, et al., were under an order from the District Court, issued on May 16, 1960, prohibiting such a strike, which the Brotherhood agreed should remain in effect until the District Court acted on the request for a preliminary injunction (R. 169, 170). A preliminary injunction was issued on June 2, 1966, and a permanent injunction on July 27, 1960 (R. 69).

The District Court, on March 16, 1965, entered an order giving judgment in favor of the Rio Grande against respondents in the sum of $37,988.37 and costs (R. 81, 82). This amount was the damage claimed by the Rio Grande from the loss of revenue from shipments it alleged were diverted by the Ford Motor Company and its suppliers during the period May 19, 1960, to June 1, 1960 (R. 79, 80). In its Findings of Fact and Conclusions of law upon which the judgment was based, the District Court did not find that the diversion in question was caused by the strike of May 16, 1960, but was "approximately caused by the existing threat of a strike and the failure to secure an injunction against such a strike" (R. 80).

The District Court dismissed the action against the chairmen of the local lodges of the Brotherhood on the grounds that there was no mention during the trial of such individuals (R. 80). Although the judgment ran

against respondent Carroll, chairman of the grievance committee of local lodge of the Brotherhood on the Rio Grande (R. 10), as well as the Brotherhood, the District Court's Findings of Fact did not include any findings that Mr. Carroll was in any way responsible for the strike (R. 77-80).

The Brotherhood and Mr. Carroll appealed the judgment. The appeal was based on the grounds:

(1) That venue for the suit did not properly lie in the judicial district of Colorado under Title 28, Section 1391(b), of the United States Code;

(2) That Mr. R. E. Carroll was improperly held liable by reason of the strike conducted by the Brotherhood although the District Court's Findings of Fact did not contain any finding of any act by Mr. Carroll in violation of the Railway Labor Act;

(3) That the Rio Grande was not entitled to recover any damages from the Brotherhood and Mr. Carroll because the strike was provoked by the action of the carrier in violating the Railway Labor Act by its refusal to make effective Award No. 19372 although it had no legal right to refuse to so act under the decision of this Court in *Gunther* v. *San Diego & Arizona Eastern Ry. Co.*, 382 U.S. 257;

(4) That the strike of May 16, 1960, was not the proximate cause of the damages awarded the Rio Grande but rather such cause was the threat of a future strike which, if it existed at all, was the threat of a lawful strike which could have been conducted only if authorized by the District Court; and

(5) That the evidence did not support the judgment since the testimony as to diversion of shipments was either inadmissible hearsay evidence or evidence vio-

lating the best evidence rule; shipments were involved which were almost immediately replaced with no loss of revenue; the judgment did not include an offset of the claimed loss of revenue by all of the carrier's expenses for the transportation of the shipments involved; and the judgment did not take into account the amount of employee wages saved by the carrier during the eight-hour period of the strike on May 16, 1960.

On September 21, 1966, the Court of Appeals reversed the judgment of the District Court. It did so on the ground that venue for the action did not lie in the United States District Court for the District of Colorado under Title 28, Section 1391(b), of the United States Code. In addition, the Court of Appeals found as follows with respect to the judgment against respondent Carroll: (367 F.2d at 139)

> "So far as the record shows, Carroll's role in connection with the strike was limited to sending the Railroad notice of the Brotherhood's strike decision and thereafter advising the local unions of the issuance of the restraining order. Carroll had no more to do with causing the strike than did the chairmen of the locals, and accordingly, he too should have been dismissed from the action."

The petition asks this Court to review such decision.

REASONS FOR DENYING THE PETITION

1. The petition argues that certiorari should be granted because the Court of Appeals erred in its interpretation and application of Title 28, Section 1391 (b), of the United States Code (Pet. 6-11). Petitioner says that the Court of Appeals should have held that an unincorporated labor organization resides for venue purposes in any judicial district in which it does business, i.e. represents employees. Such an in-

terpretation does violence to the clear language and structure of Section 1391, which specifically provides that corporations shall be regarded as residents of judicial districts in which they do business but does not so provide with respect to unincorporated associations. It is argued that such addition to the statute by way of interpretation is justified by the practical requirements of litigation involving unincorporated associations.

However, this Court in its decision in *United Steelworkers* v. *Bouligny,* 382 U.S. 145 (1965), held that the practicality argument could not be used as a basis for establishing the citizenship of an unincorporated association for the purposes of Section 1332, and was an argument which should be addressed to Congress rather than the courts. The Court of Appeals in the present case cited the *Bouligny* decision and correctly held that its reasoning constituted a rejection of the principle upon which petitioner relies. Petitioner contends that this is not so because the *Bouligny* decision involved the problem of diversity of citizenship while the present case involves the problem of venue. The point, however, is that the reasoning relied upon by the petitioner is the identical reasoning presented to the Court in the *Bouligny* case and there rejected. Moreover, petitioner is asking this Court to apply one rationale in the interpretation of Section 1332 and the opposite rationale in the interpretation of Section 1391 so that carriers will have it both ways in suits against labor unions. If the carrier chooses to sue in a state court, the labor union is to be regarded as an association of individuals so that its cause may not be removed to a Federal court. On the other hand, if the carrier chooses to sue in a Federal court, the labor union is not only to be treated as an entity but is to be treated

as a corporation to which the provisions of Section 1391(c) apply.

Further, it is not necessary to apply the reasoning of the *Bouligny* case in order to reject the proposition that an unincorporated labor organization is a resident for venue purposes of each judicial district in which it does business. Not only does the language of Section 1391 conflict with such a proposition, but Congress itself has shown that it does not so interpret the Section. Thus, in enacting Section 301 of the Labor-Management Relations Act (29 U.S.C.A., Section 185), Congress provided that a labor organization might be sued for violation of a contract between the organization and an employer either (1) in the district in which such organization maintains its principal office, or (2) in any district in which it is engaged in representing or acting for employee members. If it could have been sued in any such judicial district under the general venue statute, such a specific provision would not have been necessary. Again, when Congress provided for actions against labor organizations for violations of rights secured by Title I of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C.A., Section 412), it provided that such actions could be brought either in the judicial district where the violation occurred or where the principal office of such labor organization was located. Here, again, if an organization could be sued in any judicial district in which it is doing business under the general venue statute, it would not have been necessary for Congress to include the cited venue provisions in the later statute. The conclusion is inescapable that in a case in which venue rests upon the general venue statute, an unincorporated association is not a resident of every judicial district in which it does business.

Nor is there a practical need for the result urged by the petition. Petitioner suggests that such a result is necessary in order to enjoin a union from conducting strikes. However, in the present case the restraining order and injunction which the carrier obtained ran against all of the chairmen of the local lodges of the Brotherhood and the General Chairmen of the employees on the Rio Grande located in Colorado so that it was totally unnecessary to have the Brotherhood as a party defendant.

Moreover, the validity of the decision of the Court of Appeals with respect to venue does not have to rest on the correctness of its decision with respect to the residence of an unincorporated association. Venue did not lie under Section 1391(b) regardless of the "residence" of the Brotherhood because all of the individual defendants did not reside in the judicial district of Colorado as required by that Section. At least one of the individual defendants, Mr. M. C. Brown, resided in the State of Utah, outside of the judicial district of Colorado (R. 4-6, 10, 73). The proposed Findings of Fact submitted by the Rio Grande to the District Court specifically stated that Mr. Brown resides within the State of Utah (R. 73).[5]

[5] The petition suggests (footnote 1, page 18) that, instead of dismissing the action, the Court of Appeals should have remanded it to the District Court to determine whether in the interest of justice the case should be transferred rather than dismissed. In the *Whittier* case, cited by the petitioner, the party objecting to venue had waived its rights. In the present case, respondents preserved their rights by a Rule 12(b) motion (R. 9) and also after denial of the motion by denying the allegations of paragraph 3 of the amended complaint (R. 7) that all of the defendants resided within the judicial district of Colorado (R. 12). Moreover, there is no judicial district to which the District Court could have transferred the cause of action against all defendants residents

2. The petition argues that certiorari should be granted because the decision of the Court of Appeals conflicts with the decision of the Second Circuit in *Rutland Railway Corporation* v. *Brotherhood of Locomotive Engineers,* 307 F.2d 21 (1962), *cert. den.* 372 U.S. 954. (Pet. 11-15.) It is true that in that decision the Second Circuit held that an unincorporated association could be sued in the judicial district there involved on the ground that it was a resident of that judicial district because it was doing business there, i.e. representing employees. The basis of this decision was "the practical requirements of litigation involving unincorporated associations" (307 F.2d at 29), an argument subsequently rejected by this Court in *Bouligny, supra,* page 11. Moreover, as pointed out above, the validity of the decision of the Court of Appeals in the present case does not turn on the validity of its interpretation of Section 1391 as applied to an unincorporated association since at least one of the individual defendants was a resident of the State of Utah outside of the judicial district involved.

Further, this case does not present an appropriate vehicle for a review of the questions presented by the petition. As the petition recognizes, venue is not a jurisdictional concept but is a matter of convenience. The convenience of the Rio Grande was not served in this case by the choice of the judicial district of Colorado as a forum for its suit. The principal counsel for

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of Colorado, Ohio, and Utah. The statement in the petition that the Brotherhood was not inconvenienced by being required to defend an action more than a thousand miles from its principal place of business is without foundation in fact. The suggestion in the petition would, under the facts of this case, render the venue requirements meaningless and would simply encourage carriers to ignore them.

the Rio Grande throughout the litigation have been attorneys from Chicago, Illinois, associated with the same Chicago law firm serving as attorney on the present petition (R. 3, 87).[6]

In addition, the principal witness for the Rio Grande in the trial of the complaint in the District Court upon whose testimony most of the claim of diversion rests was the Manager of Traffic Analysis of the Ford Motor Company from Dearborn, Michigan (R. 95-115). Thus, in terms of convenience the Rio Grande and the Brotherhood as well would have been better served if the complaint had been filed in the judicial district of the headquarters and principal place of business of the Brotherhood in Cleveland, Ohio. The present petition thus seeks a review of the venue question solely to justify the bringing of the suit in a forum more than a thousand miles distance from the residence of the carrier's attorneys and its principal witness.

3. The petition argues that certiorari should be granted because the Court of Appeals decision is inconsistent with the *Bouligny* decision. The argument is that the Brotherhood is treated as a resident of Cleveland, Ohio, where its headquarters are located and which is its principal place of business only by regarding it as a jural entity. The petition contends that if the reasoning of the *Bouligny* case prevents the treatment of an unincorporated association as a resident for venue purposes of any judicial district in which it does business, i.e. represents employees, the same reasoning prevents it being regarded as a resident where it has

[6] This is also shown by appearances on behalf of the Rio Grande before the District Court and the Court of Appeals in the present case as well as in the other cited cases dealing with the enforcement of the Adjustment Board awards.

its headquarters or principal place of business. It is, as pointed out above, not necessary to the validity of the decision in this case to decide where an unincorporated labor union may be sued. Also it does not follow that treating an unincorporated association as an entity to the extent of concluding that it is a resident for venue purposes of the judicial district in which it has its headquarters or principal place of business requires that it also must be treated as a resident for venue purposes of every judicial district in which it does business, i.e. represents employees. A corporation under the venue statute is a resident of judicial districts in which it does business only by reason of a specific statutory provision in Section 1391(c) and not because it is regarded as an entity.

4. The petition argues that certiorari should be granted with respect to the findings of the Court of Appeals that the action should have been dismissed with respect to respondent R. E. Carroll because the evidence did not show that he was responsible for the calling of the strike. The petition simply argues with the Court of Appeals interpretation of the facts on this matter, which does not give rise to an issue for this Court to review.

The suggestion in the petition that Mr. Carroll, who was an employee of the Rio Grande elected by the local lodges on the carrier's property to represent them (R. 10, 77), should be held responsible for the strike because he advised the local lodges of the entry by the District Court of a restraining order enjoining the strike deserves little comment. The complaint upon which the restraining order was issued named all of the chairmen of the local lodges as well as Mr. Carroll as defendants. *Denver & Rio Grande Western R. Co.*

v. *Brotherhood of Railroad Trainmen,* 185 F. Supp. 369 (1960). Moreover, Mr. Carroll is to be commended for promptly advising the local lodges of the restraining order rather than leaving the matter to a service of process so that the strike might have gone on for a longer period of time. Certainly, such action should not be used as a basis to establish his liability for the carrier's claims.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

STATUTE INVOLVED

Section 1391 of United States Code (28 U.S.C.A., Section 1391):

"(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

"(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

"(d) An alien may be sued in any district.

"(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

"The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

"(f) A civil action on a tort claim arising out of the manufacture, assembly, repair, ownership, maintenance, use, or operation of an automobile may be brought in the judicial district wherein the act or omission complained of occurred."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 794

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF RAILROAD TRAINMEN and R. E. CARROLL,

Respondents.

REPLY TO BRIEF IN OPPOSITION

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Respondents.

REPLY TO BRIEF IN OPPOSITION

Respondents' primary reliance in opposing the petition for certiorari is the claim that one of the defendants in the District Court was a resident of Utah and that the decision of the Court of Appeals can be sustained on that basis. (Brief in Opposition, pp. 2, 13, 14, 16) This position is in sharp contrast with the position which respondents took in the Court of Appeals where respondents stated the venue issue as follows:

> "Venue in the present case depends upon whether the BRT is held to 'reside' within the judicial district of Colorado where it represents employees or in Cleveland, Ohio, which is the location of its headquarters and its principal place of business, as required by its constitution." (Brief of Appellants in the United States Court of Appeals for the Tenth Circuit, p. 6.)

The two briefs which respondents filed in the Court of Appeals are utterly devoid of any reference to or reliance upon the claim that a Utah resident had been a defendant in the District Court. As stated, the sole venue objection which the respondents raised in the Court of Appeals related to the residence of the Brotherhood of Railroad Trainmen, and the decision of the Court is limited to a resolution of the question thus posed.

What respondents do not make clear in their brief in opposition is the fact that the defendant Brown, purportedly a resident of Utah, was dismissed from the action prior to the entry of judgment (R. 80). The judgment from which respondents appealed runs only against R. E. Carroll and the Brotherhood of Railroad Trainmen. The alleged Utah resident is not a party to the judgment and was not a party to the appeal. Consequently, respondents are in the position of relying here upon a venue objection which was not raised in the Court of Appeals and which could have been raised only by a defendant who was dismissed from the action before entry of judgment in the District Court. Since venue is a personal matter, it is clear that the respondents may not attempt to sustain the decision of the Court of Appeals by urging venue objections applicable to others who are no longer parties to the litigation.

Since the time of this Court's decision in *Camp* v. *Gress*, 250 U.S. 308, it has been considered established doctrine that the defense of improper venue is personal, that it may be raised only by the affected individual and not by others, that it may be waived, and that improper venue as to some defendants does not deprive a court of jurisdiction to render judgment as to others. *1 Moore's Federal Practice* 1321; *Hart and Wechsler, The Federal Courts and the Federal System*, p. 950; *Vance Trucking Co.* v. *Canal Insurance Company*, 338 F.2d 943 (4th Cir. 1964); *Schoen* v.

Mountain Producers Corp., 170 F.2d 707 (3rd Cir. 1948), cert. denied, 336 U.S. 937; *Riley* v. *Union Pacific R. Co.*, 177 F.2d 673 (7th Cir., 1949), cert. denied, 338 U.S. 911.

Respondents' reliance on the claimed Utah residence of defendant Brown is in conflict with each major aspect of the venue principles established by *Camp* v. *Gress, supra.* Respondents seek to assert a venue objection which is not applicable to them, which was not raised by respondents in the Court of Appeals and which was eliminated in any event by the dismissal of defendant Brown in the District Court. Since no appeal was taken from defendant Brown's dismissal, it is apparent that any venue objections which he might have had cannot assist the respondents here.[1]

Respondents also urge that the provisions of Section 1391(c) of Title 28 do not apply to an unincorporated association since Congress in Section 301 of the Labor-Management Relations Act specifically provided that a labor organization might be sued in any district in which it is engaged in representing or acting for employee members. Respondents state that "If it could have been sued in any such judicial district under the general venue statute, such a specific provision would not have been necessary." (Brief in Opposition, Page 12.) What respondents over-

[1] The record of proceedings in the District Court does not indicate any specific venue objection by defendants, including the respondents here, based on the asserted Utah residence of defendant Brown. The first motion by defendants raising venue objections was based on the claim that the Brotherhood of Railroad Trainmen was not a resident of Colorado (R. 4). The second motion sought dismissal "on the ground of improper venue" (R. 9). The final instrument in which the defendants asserted improper venue in the District Court, the Answer to the Amended Complaint, was limited to the situation of the Brotherhood of Railroad Trainmen (R. 11). It may reasonably be concluded, therefore, that any venue objection based on the residence of defendant Brown was waived.

look in making this argument is the fact that the general venue statute as it existed in 1947 when the Labor-Management Relations Act was passed did not contain what is now Section 1391(c). At the time of the enactment of the Labor-Management Relations Act the general venue statute was comparable to the statute discussed by Judge Learned Hand in *Sperry Products* v. *Association of American Railroads,* 132 F.2d 408 (2nd Cir., 1942), limiting venue to the defendant's principal place of business or to the judicial district of which defendant was an inhabitant. Consequently, it was necessary at that time to provide specifically for actions against unincorporated associations in districts in which they were doing business, if the associations did not maintain their principal places of business therein. The more general venue provision discussed by the court in *Rutland Railway Corporation* v. *Brotherhood of Locomotive Engineers,* 307 F.2d 21 (2nd Cir., 1962), was not enacted until September 1948. Thus, the fact that Congress in 1947 specifically authorized actions in districts where labor unions were representing employees does not support respondents' interpretation of the general venue provisions enacted in 1948.

Respondents' reliance upon the provisions of 29 U.S.C.A. § 412 is also misplaced. When Congress provided in Title 1 of the Labor-Management Reporting and Disclosure Act of 1959 that actions could be brought against labor unions in the judicial districts in which the alleged violations occurred, it was expanding venue beyond that comprehended by the general provisions of Section 1391. Consequently, the fact that Congress specifically provided for venue in such judicial districts in 1959 in actions arising under the Labor-Management Reporting and Disclosure Act does not support the argument that the general venue provisions of Section 1391(c) are inapplicable to unincorporated associations.

Much of respondents' brief in opposition is devoted to a reiteration of the arguments on the merits which the District Court overruled when it entered judgment against respondents for damages resulting from the unlawful strike. Since the Court of Appeals considered only the venue issue, respondents' discussion of the merits is wholly irrelevant to the issues raised by the petition. Accordingly, we shall not undertake to reply to the tenuous arguments which respondents advance, but we do desire to call the Court's attention to a wholly unwarranted assertion which appears at page 4 of the brief in opposition. Respondents state that the "contract violation by the Rio Grande originally took place in 1952 and continued over a period of approximately eight years." As the award of the National Railroad Adjustment Board shows, however, the question as to whether or not the Rio Grande could properly require crews of incoming freight trains to herd engines at its North Denver Yard was submitted to a Special Board of Adjustment by the Rio Grande and the Brotherhood of Railroad Trainmen in 1952. On June 23, 1952, the Special Board of Adjustment rendered an award sustaining the position of the Rio Grande (Award 19389, Volume 142 of the Reports of the First Division of the National Railroad Adjustment Board, Page 858). Although the agreement between the Brotherhood of Railroad Trainmen and the Rio Grande provided that the award of the Special Board was to be final and binding, the Brotherhood of Railroad Trainmen nevertheless refused to accept the decision of the Special Board and filed claims with the National Railroad Adjustment Board based on the precise carrier practice which had been approved by the Special Board. On January 20, 1960, the National Railroad Adjustment Board held that the carrier practice was a violation of the agreement, despite the prior final and binding award of the Special Board. The carrier then discontinued the practice of having the crews of in-

coming trains herd engines at the North Denver Yard. Consequently, the herding practice which the carrier followed at its North Denver Yard during the period from 1952 to 1960 was in conformity with the decision of the Special Board of Adjustment. Since the Special Board of Adjustment had found that this practice was proper under the agreement, it is obvious that the carrier was not pursuing a practice which could properly be called a violation of the agreement. By referring the matter to the Special Board in 1952, the carrier had sought to dispel any doubts about the validity of the practice under the existing agreement and had secured what it considered to be a final and binding determination. It was only because of the Brotherhood's stubborn refusal to honor this determination that the subsequent difficulties arose.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1966

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v.

BROTHERHOOD OF RAILROAD TRAINMEN and R. E. CARROLL, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 794

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *Petitioner,*

v.

BROTHERHOOD OF RAILROAD TRAINMEN and R. E. CARROLL, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE

Interest of the Amicus Curiae

The National Railway Labor Conference, the *amicus curiae* on whose behalf this brief is submitted, represents the great majority of American railroads. Its function is to assist these railroads in connection with labor relations problems and to represent them in contract negotiations that are national in scope. In this connection, the Conference speaks for virtually the entire railroad industry. A list of the member railroads appears in Appendix A, pp. 39-41, *infra*.

The respondent in this case, the Brotherhood of Railroad Trainmen, is an unincorporated labor organization which

represents certain railroad employees in 48 of the 50 states. The Brotherhood holds the right under the Railway Labor Act (45 U.S.C. § 151 et seq.) to represent trainmen employed by the great majority of the members of the Conference, and also to represent conductors on many member roads. A number of other national railway labor organizations, resembling the Brotherhood in organizational structure and method of operation, hold representation rights with respect to most other employees of members of the Conference. See Thirty-First Annual Report of the National Mediation Board, pp. 78-83, reprinted as Appendix B, pp. 42-48, *infra*.[1]

An affirmance of the decision below would have serious consequences throughout the railroad industry and would adversely affect the Conference and its members because it would require that numerous important suits against railway labor organizations either be tried in an exceedingly inconvenient forum or be prosecuted against local officers of the union in the absence of the most important potential defendant, the national union itself. The court below held that under the general venue statute (28 U.S.C. § 1391), proper venue for a non-diversity suit against an unincorporated labor union is limited to the district in which the union is headquartered (in this case, Cleveland, Ohio), and does not include other districts, in which the union is doing business, located at or near the scene of the parties' controversy (Colorado and Utah). That holding is directly in conflict with the contrary holding in *Rutland*

[1] The Thirty-First Annual Report of the National Mediation Board, for the fiscal year ended June 30, 1965, shows that the Brotherhood represents one or more classes or crafts of railroad employees on 91 "selected rail carriers," nearly all of which are members of the Conference. Compare Appendices A and B hereto. Because the Mediation Board Report lists "selected" carriers only, the listing does not show all the carriers in the Conference on which the Brotherhood holds representation rights.

Railway Corp. v. *Brotherhood of Locomotive Engineers*, 307 F.2d 21 (2d Cir. 1962), *cert. denied*, 372 U.S. 954. As we show in some detail below (pp. 27-37, *infra*), the Brotherhood of Railroad Trainmen, like most other national railway labor organizations, consists of a national organization and numerous subordinate local entities on each of the railroads in 48 states on which the Brotherhood holds representation rights. The national organization is designated under the Railway Labor Act as the employees' representative, and discharges its function in that regard, under the Brotherhood's Constitution and General Rules, through its subordinate local organizations and their officers. Accordingly, in the usual railway labor suit (of which this case is an excellent example), the proper venue under the decision below would be in a forum having relatively little connection with the controversy—far removed from the railroad and the employees involved, the subject matter of the litigation, and the location of witnesses, records, and the parties' principal representatives in the dispute. Trial of such cases in such a forum frequently would be excessively expensive and inconvenient. The consequences of an affirmance of the decision below would be particularly injurious in the case of enjoinable strikes instituted in violation of the requirements of the Railway Labor Act. In the usual case of that kind, relief must be obtained immediately if irreparable injury is to be avoided, and thus must be obtained from a court in the vicinity of the strike, yet to be fully effective relief must run against the national organization, which under the Brotherhood's Constitution has the power both to authorize strikes and to end them.[2]

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[2] When the court below rendered its decision, Section 1391(b) of the Judicial Code (28 U.S.C. § 1391 (b)) provided for venue in non-diversity cases only "in the judicial district where all defendants reside." Subsequently, Section 1391(b) was amended to provide for venue also in the "district . . . in which the claim arose." Public Law 89-714, approved

Statement

The Brief for Petitioner sets forth a detailed and accurate statement of the facts, and we see no purpose in repeating that statement here. We also agree with the arguments presented in the Brief for Petitioner, but believe that it may be helpful to the Court to stress certain considerations which we deem to be of general importance. In particular, because the statutory venue requirements are intended to serve "the convenience of litigants"[3] and an affirmance of the decision below could seriously inconvenience the conduct of much litigation involving the Railway Labor Act (45 U.S.C. § 151 *et seq.*), we discuss in some detail the practical ramifications of the venue issue in terms of railway labor litigation.

Summary of Argument

The question before the Court is whether, for purposes of the general venue statute applicable to "federal question" litigation, 28 U.S.C. § 1391, an unincorporated labor union "resides" in each district in which it is "doing business."

Nov. 2, 1966. That amendment *may* alleviate some of the serious consequences of the limitation on venue which otherwise would result from an affirmance of the decision below. However, it will not alleviate all such problems by any means. Among other things, there will be cases in which the district in which the claim "arises" is not as convenient a forum as other districts in which venue would be proper under the *Rutland* decision. For example, a union may call a strike in one district against a railroad which operates in several, and the district in which the strike occurs may be a district other than the district in which the union's most important responsible local official (the General Chairman) is located. Moreover, "[t]he selection of venue should be a simple, almost mechanical, process unhampered by complex requirements," 1 Moore's Federal Practice (2d ed), p. 1318, and determining where "the claim arose" in the many railway labor disputes which have multi-district contacts will be a matter which will be anything but a "simple, almost mechanical, process." To the contrary, it is predictable that the new provision will breed extensive litigation in the future.

[3] *Neirbo Co.* v. *Bethlehem Corp.*, 308 U.S. 165, 168 (1939).

Rutland Railway Corp. v. *Brotherhood of Locomotive Engineers*, 307 F.2d 21 (2d Cir. 1962), *cert. denied*, 372 U.S. 954, held that an unincorporated labor union does so reside. The Court below held, to the contrary, that the residence of an unincorporated labor union is limited to the district in which its headquarters are located. We submit that the *Rutland* decision is sound, the decision below unsound, both as an analytical matter, and as a matter of venue policy.

Before the decision in *United Mine Workers* v. *Coronado Co.*, 259 U.S. 344 (1922), unincorporated associations could not sue or be sued, as such, in federal court. However, that decision, and Rule 17(b) of the Federal Rules of Civil Procedure, established the capacity of such associations to sue and be sued in "federal question" litigation. Consequently, it became necessary for the courts to establish the rules by which the venue statutes would be applied to such associations.

By the time the present general venue statute was enacted in 1948, the basic rules governing venue as to unincorporated associations had been developed. The leading decision was *Sperry Products* v. *Association of American Railroads*, 132 F.2d 408 (2d Cir. 1942). In that decision, Judge Learned Hand, for the Second Circuit, held that although unincorporated associations are deemed to be mere aggregations of individuals for purposes of determining whether diversity jurisdiction exists, in cases in which they are sued under the *United Mine Workers* doctrine, they should be regarded as jural persons for procedural incidents of suit, including venue. Further, he held that the location attributed to such entities for venue purposes should be determined by the tests applied to corporations, rather than by some new test devised for unincorporated associations alone. This approach, he believed, had the virtues of simplicity and practicality, and thus was supported by fundamental venue policy. On those premises, Judge Hand went

on to hold, by analogy to the law regarding corporations as it existed at the time, that an unincorporated association resides in a single district, that of its principal place of business.

Thus, *Sperry Products* established two fundamental rules regarding venue of unincorporated associations—(1) that such associations should be regarded as jural entities for venue purposes, and (2) that so regarded, their residence should be determined by tests applied to corporations. In 1948, Congress enacted the present general venue statute, 28 U.S.C. § 1391. Nothing in that statute altered the two fundamental rules established by *Sperry Products*. However, Section 1391(c) redefined corporate residence to substitute a multi-district residence based on "doing business." Accordingly, the question arose whether the corporate analogy to be used in determining venue of unincorporated associations should continue to be the pre-1948 corporate analogy, or the current corporate analogy. A few early lower court decisions, noting the *holding* in *Sperry Products* but failing to analyze the premises on which it rested, held that the residence of an unincorporated association was still limited to the association's principal place of business. However, a majority of courts, including the Second Circuit in *Rutland*, held that the corporate analogy which should be used to determine residence of unincorporated associations should be the current corporate analogy, and thus that unincorporated unions reside in each district in which they are "doing business." That result was justified on the ground that it accords "with the practical requirements of litigation involving unincorporated associations," 307 F.2d at 29-30, and thus, since "venue is a concept of convenience," *id.* at 29, is consistent with fundamental venue policy.

In any event, until the decision below, no court challenged

the two fundamental rules established by *Sperry Products* —that for venue purposes, unincorporated associations should be regarded as entities, with a residence determined by analogy to corporations. Any uncertainty in the law was limited to the question whether the analogy should be to the law regarding corporations before, or after, 1948.

The Court below held that an unincorporated association resides only in the district of its principal place of business. It rested that conclusion, however, on the assertion that this Court's decision in *Steelworkers* v. *Bouligny, Inc.*, 382 U.S. 145 (1965), "was a rejection of the principle espoused by the *Rutland* case." By intruding the rule of *Steelworkers* into the law of venue, the decision below strikes at the settled fundamentals of the law we have just described.

In *Steelworkers*, this Court refused to change the rule, established since *Chapman* v. *Barney*, 129 U.S. 677 (1889), that "for purposes of federal diversity jurisdiction," an unincorporated association is to be treated as an aggregation of individuals. The Court recognized the force of arguments advanced in support of a change in that rule, but held nevertheless that "pleas for an extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts." 382 U.S. at 150-151. There is nothing in that holding, or in the reasons given for it, which has any relevance to venue. The established rule for purposes of diversity jurisdiction—that unincorporated associations are deemed to be aggregations of individuals in testing diversity—differs from the established rule for venue purposes—that unincorporated associations are deemed to be jural persons in determining residence—because the considerations which underlie the two different rules differ. Unlike jurisdiction, venue, "though defined by legislation

relates to the convenience of litigants." *Neirbo Co.* v. *Bethlehem Corp.*, 308 U.S. 165, 168 (1939). The decision below, by extending the principles expressed in *Steelworkers* to the law of venue, would change established law as to venue developed in response to considerations of convenience, on the strength of a decision that refused to change established law as to jurisdiction developed in response to quite different considerations.

Moreover, the inapplicability of *Steelworkers* to venue is emphasized by the fact that the Court below, while purporting to be guided by *Steelworkers*, actually refused to follow the principles expressed in that decision. The Court below held that the Brotherhood resides only in its headquarters district, the Northern District of Ohio, and not in the District of Colorado. That result cannot be premised on *Steelworkers*.

As a conceptual matter, *Steelworkers* treats unions as aggregations of individuals each of whom is deemed to be a party to a lawsuit for purposes of determining whether diversity of citizenship exists. If that approach is applied in determining residence of "all defendants" for purposes of the general venue statute, there is *no* proper residence venue for a suit against a large labor union because "all defendants"—all union members—do not reside in any single district. In this case, venue would not lie in the Northern District of Ohio any more than it would in the District of Colorado.

On the other hand, in more practical terms, *Steelworkers* treats unions—which are the real parties to the litigation—as though they are citizens of each state in which they have members who are citizens. If the same practical approach were applied to the general venue statute, unions would "reside" in each district in which their members reside. Thus, in this case, venue would be equally proper both in

the Northern District of Ohio and in the District of Colorado. While we believe that *Steelworkers* is irrelevant to venue, if *Steelworkers* is to be applied to venue problems, we submit that this practical approach is clearly the most defensible approach to the problem.

In any event, *Steelworkers* cannot be used to support the holding below that the Brotherhood resides only in the District in which its national headquarters are located. Support for that holding can only be found in those few decisions, antedating *Rutland*, which treat unions as entities with a residence determined by analogy to the tests developed for corporations prior to 1948. For reasons advanced in the *Rutland* decision, we submit that the proper corporate analogy is to the law regarding corporations today, not to the law which existed two decades ago.

Moreover, fundamental venue policy supports the *Rutland* holding that a union resides wherever it is "doing business," as contrasted with the holding below that a union resides only in its headquarters district. Venue rules are intended to serve "the convenience of litigants." *Neirbo Co.* v. *Bethlehem Corp.*, *supra*. Large labor unions, like large corporate enterprises, conduct their business throughout the nation through numerous local agents and representatives. Their activities give rise to much litigation. As is illustrated by an analysis of the manner in which the respondent Brotherhood performs its representation function under the Railway Labor Act, a forum in the vicinity of union activities which give rise to litigation ordinarily is a far more convenient forum than the district in which the union's national headquarters is located. That is equally true both for the union and its opponents. In these circumstances, a rule which would tend to restrict venue of such litigation to the union's headquarters is opposed to fundamental venue policy. Further, such a rule

would tend to immunize unions, their national officers, and their treasuries, from responsibility for their activities at the site of those activities—the place where relief must be available if it is to be fully effective. Since a rule restricting venue to the union's headquarters district is opposed to fundamental venue policy, and since Congress has left the courts free to devise a rule which serves those policies, there is no reason why the courts should adopt a rule for unincorporated associations which has exactly the sort of "intolerable" consequences which led Congress to change the rule regarding corporations in 1948.

In short, unions should be held to reside, for purposes of the general venue statute, wherever they are "doing business." If a union is sued in what is really an inconvenient forum, the matter can be controlled under the transfer provisions of 28 U.S.C. § 1404(a).

Argument

Venue in this case is governed by Section 1391(b) of the Judicial Code, as it read prior to the enactment of P.L. 89-714:[4]

> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

The issue before the Court is whether an unincorporated labor union "resides," for purposes of Section 1391(b), in districts in which it is "doing business." In the first section of this argument, we show that in principle, the court below was in error, the *Rutland* court right. An unincorporated association should be held to reside in each district in which it does business. In the second section of the

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[4] See footnote 2, p. 3, *supra*.

argument, we show that the result below would greatly inconvenience both union and railroad litigants, and thus is opposed to the very purpose of venue provisions. By way of contrast, the holding in *Rutland* is sound as a matter of venue policy.

I. The Decision Below Is Unsound in Principle

As we show below, before the enactment of the present general venue statute in 1948 it was established that unincorporated associations sued in their own right should be regarded as entities for venue purposes, their residence to be determined by analogy to corporations. Prior to 1948, by analogy to corporations, the residence of unincorporated associations was held to be limited to a single district—that of the principal place of business. In 1948, Congress redefined corporate residence to extend to all districts in which a corporation is doing business. *Rutland Railway Corp.* v. *Brotherhood of Locomotive Engineers,* 307 F. 2d 21 (2d Cir. 1962), *cert. denied,* 372 U.S. 954, and a number of other decisions held that the residence of unincorporated associations accordingly was extended to all districts in which they are doing business.

There are two theories on which the *Rutland* rule might be rejected. The first would be that while unincorporated associations are entities for venue purposes, their residence should be determined by some test other than the test applied to corporations today. One such test is the pre-1948 corporation test—which leads to the conclusion that the only residence of an unincorporated association is at its principal place of business. That test was adopted by a few lower court decisions, all of which antedated *Rutland,* which provide the only support for the result reached by the court below. The only other available alternative would be to devise an entirely new test for unincorporated asso-

ciations—*e.g.*, to hold that unincorporated associations are resident and venue is proper wherever their members reside, which in the case of the Brotherhood would be in 48 of the 50 states, including the District of Colorado.

The second and more radical basis on which the *Rutland* rule might be rejected would be to hold that unincorporated associations are not to be regarded as entities for venue purposes but instead are to be regarded as mere aggregations of individuals, all of whom are to be deemed "defendants" when the association is sued. If so, since members of large labor unions reside in more than one district, venue would never be proper under the residency provision in Section 1391(b)—not "all defendants [*i.e.*, members of the association] reside" in any one district. Such a holding would overturn venue doctrines which have been established for 25 years and would force much railway labor litigation now entertained by federal courts into the state courts.

The Court below stated that the choice before it was between two alternatives both of which assume that for venue purposes the Brotherhood is an entity with a residence determined by analogy to corporations. That is, the Court below indicated that venue in this case depends on whether the Brotherhood is held to reside in districts in which it is doing business (Colorado)—the post-1948 corporation approach—or only in the district of its principal place of business—the pre-1948 corporation approach. Illogically, however, the Court rejected the post-1948 corporate analogy advocated by the Rio Grande, not on the ground that pre-1948 law remained unchanged with respect to unincorporated associations, but instead on the ground that *Steelworkers* v. *Bouligny, Inc.*, 382 U.S. 145 (1965), "was a rejection of the principle espoused by the *Rutland* case." *Steelworkers* held that for diversity jurisdiction

purposes, unincorporated associations are mere aggregations of individuals. Thus, if *Steelworkers* were relevant to venue (which as we show it is not), neither alternative stated by the Court below would be correct. Rather the Brotherhood would be a group of individuals living in more than one district, and thus venue would lie nowhere.

We think the decision below is unsupportable. The intrusion into the venue area of the *Steelworkers* principle, justified in its own sphere on the ground that changes in the previously settled boundaries of federal jurisdiction should be made by Congress, not by the courts, would overturn established fundamentals in the venue area. There is no justification for that. No such result was contemplated when Congress enacted the present venue statute without changing the then existing rule that unincorporated associations are entities for purposes of the residency requirement. In short, for venue purposes unincorporated associations should be viewed as entities. Thus viewed, we submit that the corporate analogy should still be followed, and that the analogy should be to post-1948 law, not to earlier rules.

Before the decision in *United Mine Workers* v. *Coronado Co.*, 259 U.S. 344 (1922), unincorporated associations could not, as such, be sued in federal court. *Sperry Products* v. *Association of American Railroads*, 132 F.2d 408, 410 (2d Cir. 1942). In the *Coronado Coal* case, however, this Court ruled that unincorporated associations could be sued in their own right, and that such associations' funds could be reached by execution on the judgment. "It would be unfortunate," the Court said, "if an organization with as great power as this International Union has in the raising of large funds and in directing the conduct of four hundred thousand members in carrying on, in a wide territory, industrial controversies and strikes, out of which so much

unlawful injury to private rights is possible, could assemble its assets to be used therein free from liability for injuries by torts committed in course of such strikes." 259 U.S. at 388-389. When the Federal Rules of Civil Procedure were adopted, the capacity of unincorporated associations to sue and be sued in "federal question" litigation was confirmed by Rule 17(b): "[C]apacity to sue or be sued shall be determined by the law of the state in which the district court is held, except . . . that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States. . . ."

After capacity for suit was established, the question of venue arose. In 1942, the Second Circuit decided *Sperry Products v. Association of American Railroads*, 132 F.2d 408 (2d Cir. 1942), which established the two basic principles which the courts have followed consistently until the decision below in determining venue with respect to unincorporated associations: (1) that for venue purposes unincorporated associations should be regarded as jural entities, and (2) that their "inhabitance"—a term synonymous with "residence" in Section 1391[5]—should be determined by analogy to the entities they most closely resemble —corporations.

The venue statute involved in the *Sperry Products* case, 28 U.S.C. §109 (1940) (now 28 U.S.C. §1400(b) (1958)), stated that suits for patent infringement might be brought "in the district of which the defendant is an inhabitant, or in any district in which the defendant . . . shall have committed acts of infringement and have a regular and

[5] See the Reviser's Note to § 1391, H.R. Rep. No. 308, 80th Cong., 1st Sess., A147 (1947).

established place of business." At the outset of the opinion for the Court, Judge Learned Hand noted that for jurisdictional purposes an unincorporated association is deemed a mere aggregation of individuals and has no citizenship of its own (132 F.2d at 410-411):

> "[I]n the matter of jurisdiction over the subject matter, an unincorporated association is disregarded: when for example jurisdiction depends upon diversity of citizenship, it is the citizenship of the members alone which counts. Levering & Garrigues Co. v. Morrin, 2 Cir., 61 F.2d 115. Thus, for most purposes the law still looks at such associations as mere aggregations of individuals."

However, Judge Hand thought that since unincorporated associations were deemed to be entities for purposes of capacity to sue they should also be viewed as such for other procedural incidents of suit such as venue, which is intended to serve the convenience of litigants (*id.* at 411):

> "Since, however, for the purpose of suit [the law] has come to regard them as jural entities, we can see no reason why that doctrine should not be applied consistently to other procedural incidents than service of process, and venue is one of such incidents. Certainly that promotes simplicity, and simplicity was one of the conveniences which induced the original change. Therefore in construing § 48, Jud. Code, 28 U.S.C.A. §109, in its application to an unincorporated association it seems inevitable that we should attribute an 'inhabitancy' to it as though it were a single jural person and not an aggregate."

Having determined that unincorporated associations should be regarded as jural entities for venue purposes,

Judge Hand turned next to the question of the location to be attributed to the entity. "It is not altogether clear a priori," he wrote, "how to attribute location to a collective venture even after one has called it a jural person" (*id.* at 411). However, just as corporations are regarded as being "present" wherever they are continuously carrying on a substantial part of their business, so too unincorporated associations should be deemed to be "present" in such circumstances. "That is a practicable test and it is really the only practicable test"[6] (*id.* at 411).

However, under the patent infringement venue statute, venue was limited to districts in which the defendant had an established place of business and in which acts of infringement occurred, or the district in which the defendant was an "inhabitant." To determine the "inhabitance" of unincorporated associations, Judge Hand continued his corporate analogy, concluding that inhabitance was limited to a single district, that of the principal place of business (*id.* at 411-412):

> "But that does not mean that the Association is an 'inhabitant' of all such places within the meaning of § 48, for it is clear that the section was passed to avoid precisely that result. Until its enactment a patentee could sue an infringer wherever he could catch him, and in the case of a corporation that meant wherever it was 'present' as determined by the test just mentioned. . . . [W]e may assume that [a corporation]

[6] "To say that [the association] exists wherever any of its members are is plainly untenable, for they all have their individual activities which are altogether alien to the enterprise. To say that the enterprise exists wherever and whenever any of the members think about it would be childish. There remains, so far as we can see, only what we have suggested; and we hold that the defendant Association was present wherever any substantial part of its activities were continuously carried on." 132 F.2d at 411.

> can be an 'inhabitant' only of the state of its incorporation, Neirbo Co. v. Bethlehem Shipbuilding Corporation, 308 U.S. 165 . . .; but even so, that will not serve as a test if there be several judicial districts in that state. Since a corporation can have no other activities than occupational, we are forced to choose among these; and it seems to us that we can only choose that place where its principal activities take place: its principal place of business. If so, the same test must apply to an unincorporated association with the added limitation that as to it no state of incorporation exists to disturb the test in application. For these reasons we think that if a patentee chooses to sue an unincorporated association under the doctrine of United Mine Workers v. Coronado Coal Co., supra, 259 U.S. 344 . . ., he must do so either at its principal place of business, or at any of the regular and established places of its business where it may have infringed."

Sperry Products involved the venue provision for patent infringement actions. However, the holding in *Sperry Products* turned upon application of the term "inhabitant" to unincorporated associations. Therefore, Judge Hand's analysis was equally applicable to the general venue statute in existence prior to the enactment of Section 1391 in 1948. That statute (28 U.S.C. § 112 (1940)) provided that "no civil suit shall be brought in any district court against any person . . . in any other district than that whereof he is an inhabitant. . . ." Consequently, in due course Judge Hand's analysis in the *Sperry Products* case was extended to the application of the general venue statute to unincorporated associations. *E.g., Brotherhood of Locomotive Firemen, etc.* v. *Graham,* 175 F.2d 802 (D.C. Cir. 1948), *rev'd on other grounds,* 338 U.S. 232.

Thus, the ground rules for determining venue for unin-

corporated associations were clearly laid out in advance of the enactment of Section 1391, the present general venue statute, in 1948. Those rules, established by *Sperry Products,* were (1) that for venue purposes unincorporated associations should be deemed entities which may have a residence—"inhabitance" was the term most used by the statutes then—and (2) that the residence should be determined by analogy to the law regarding corporations. The enactment of the redrafted general venue statute as Section 1391 in 1948 made no change that affected those basic rules—"residence" was substituted for "inhabitance" but the terms were intended to be synonymous.[7] In consequence, from the enactment of Section 1391 until the decision below, no court has challenged either of those two basic venue principles.

However, the enactment of Section 1391 did effect a change in the law which was relevant to venue of actions involving unincorporated associations. Section 1391(c) redefined corporate residence to abolish the earlier limitation to a single district and to substitute a multi-district residence based on "doing business." Section 1391(c) provides:

> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Accordingly, the question arose whether the residence of unincorporated associations should continue to be determined by analogy to the superseded law regarding corpora-

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[7] See the Reviser's Note to Section 1391, H.R. Rep. No. 308, 80th Cong., 1st Sess., A147 (1947).

tions—*i.e.*, whether the residence of unincorporated associations was still limited to the single district of the association's principal place of business—or whether instead the analogy should be to the current law as to corporations—*i.e.*, whether unincorporated associations should be held, like corporations, to be residents of each district in which they are doing business. Nothing in Section 1391 changed the law as to unincorporated associations in so many words. Consequently, a few courts, relying on Judge Hand's ultimate result and ignoring the corporate analogy on which it rested, held that the principal place of business was still the only "residence" of an unincorporated association. *E.g., Griffin* v. *Illinois Cent. R. Co.*, 88 F.Supp. 552 (N.D. Ill. 1949); *Salvant* v. *Louisville & N.R.Co.*, 83 F.Supp. 391 (W.D. Ky. 1949); *Cherico* v. *Brotherhood of Railroad Trainmen*, 167 F.Supp. 635 (S.D. N.Y. 1958); see also *Brotherhood of Locomotive Firemen, etc.* v. *Graham, supra.*

However, the prevailing view was soon to the contrary —*i.e.*, because the residence of unincorporated associations should be determined by analogy to corporations, it was held that such associations should now be held to be resident wherever they are doing business. *Rutland* was the definitive decision (307 F.2d at 29-30):

> "Venue in the federal courts is not a jurisdictional concept. See 28 U.S.C. §1406 (b) (1958); H.R. Report 308, 80th Cong., 1st Sess. A154 (1947) (Reviser's Notes). We should not think about it in the metaphysical terms which have often been associated with considerations of jurisdiction. Venue is a concept of convenience. See Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167-168 . . . ; Cohen v. Commodity Credit Corp., 172 F.Supp. 803 (W.D. Ark. 1959); Jacobson v. Indianapolis Power & Light Co., 163 F.Supp.

218 (N.D. Ind. 1958); The North River, 57 F.Supp. 808 (E.D.N.Y. 1944); Vogel v. Crown Cork & Seal Co., 36 F.Supp. 74 (D. Md. 1940). It should be treated in practical terms. See Sperry Prods., Inc. v. Ass'n of Am. R. R., supra; American Airlines v. Air Line Pilots Ass'n, [169 F.Supp. 777, 781 (S.D. N.Y. 1958)]. Congress has stated in § 1391(c) that the residence of a corporation for venue purposes is not only in the state wherein it is incorporated but also in the places where it is licensed to do business and where it is doing business. It is true that we would be reading into 28 U.S.C. § 1391(c) words which are not there if we should assert that that subsection states that it applies to unincorporated associations. See Cherico v. Brotherhood of R. R. Trainmen, supra. But we do not find any mainfestation here of a congressional policy of *expressio unius est exclusio alterius*, and so we follow the reasoning in Sperry Prods. and assimilate the residence of unincorporated associations under 28 U.S.C. § 1391(b) to that of corporations, 28 U.S.C. § 1391(c). Since the residence of a corporation for venue purposes has been expanded to include all the judicial districts in which the corporation is doing business, the residence of an unincorporated association for venue purposes should likewise be expanded to include all the judicial districts in which the unincorporated entity is doing business. We believe this accords with the practical requirements of litigation involving unincorporated associations. If an unincorporated union is carrying on sufficient activities in a particular judicial district so that it is deemed to be doing business there, it usually will suffer no undue hardship if required to stand suit there. If in certain instances the defense of a suit in a particular district

is peculiarly oppressive, the association may always seek a transfer of the action under 28 U.S.C. §1404 (a) (1958).[8]

Other cases in which the same conclusions were reached include *Portsmouth Baseball Corp.* v. *Frick*, 132 F. Supp. 922 (S.D. N.Y. 1955); *Eastern Motor Express* v. *Espenshade*, 138 F. Supp. 426 (E.D. Pa. 1956); *American Airlines* v. *Air Line Pilots Ass'n*, 169 F. Supp. 777, 780-783 (S.D. N.Y. 1958); *R & E Dental Supply Co.* v. *Ritter Co.*, 185 F. Supp. 812 (S.D. N.Y. 1959); *Chicago & N.W. Ry. Co.* v. *Brotherhood of Locomotive Eng.*, 202 F. Supp. 277 (S.D. Ia. 1962).[9]

In short, from *Sperry Products* until this case, the venue of unincorporated associations was deemed to depend on two unchallenged premises: (1) that for venue purposes such associations should be regarded as entities having a residence in their own right, and (2) that the residence should be determined, not by a new test fashioned for unincorporated associations alone, but by analogy to corporations, which associations tend to resemble. The only

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[8] The Second Circuit went on to hold that four railroad brotherhoods, one of which was the respondent Brotherhood of Railroad Trainmen, were doing business in and thus were residents of Vermont, and accordingly that venue was proper there. 307 F.2d at 30. As we understand it, it is not disputed that the Brotherhood in this case was doing business in the District of Colorado. The Colorado activities of the Brotherhood, like its Vermont activities in *Rutland*, include maintenance of a General Grievance Committee with headquarters at Denver, a strike by railroad employees against the Rio Grande in Colorado, and negotiations with the Rio Grande in Colorado (R. 92-93, 157-158).

[9] Analogously, because § 1391(c) provides that districts in which a corporation is doing business shall be regarded as the corporate residence "for venue purposes," courts have held that the statutory redefinition of corporate residence in the general venue statute is applicable to actions governed by earlier-enacted special venue statutes where the legislative history of the special provisions shows no conflicting Congressional purpose. *E.g.*, *Pure Oil Co.* v. *Suarez*, 384 U.S. 202 (1966).

uncertainty in this area of the law was whether, following statutory redefinition of corporate residence in 1948, the corporate analogy used in determining residence of unincorporated associations should be the pre-1948 corporate analogy or the current corporate analogy.

The decision below, by intruding the rule of *Steelworkers*, a diversity jurisdiction case, into the law of venue, strikes at the settled fundamentals of the law we have just described. *Steelworkers* had nothing to do with venue and the Court said nothing in its opinion about venue problems. Rather, the issue before the Court was "whether an unincorporated labor union is to be treated as a citizen *for purposes of federal diversity jurisdiction*, without regard to the citizenship of its members" (382 U.S. at 147) (emphasis added). The Court of Appeals, following a rule recognized since *Chapman* v. *Barney*, 129 U.S. 677 (1889), and recognized in the *Sperry Products* decision as the rule for purposes of subject matter jurisdiction (see p. 15, *supra*), had held that for diversity purposes an unincorporated association is still an aggregation of individuals and thus has the citizenship of each of its members. This Court affirmed, stressing the fact that if unincorporated associations were treated as entities for diversity purposes with a citizenship determined like that of a corporation, the diversity jurisdiction of the federal courts would be considerably expanded. The Court recognized the force of arguments advanced in support of a change in the rule of *Chapman* v. *Barney*, *supra:*

> "In recent years courts and commentators have reflected dissatisfaction with the rule of *Chapman* v. *Barney* [footnote omitted]. The distinction between the 'personality' and 'citizenship' of corporations and that of labor unions and other unincorporated associations, it is increasingly argued, has become artificial

and unreal. The mere fact that a corporation is endowed with a birth certificate is, they say, of no consequence. In truth and in fact, they point out, many voluntary associations and labor unions are indistinguishable from corporations in terms of the reality of function and structure, and to say that the latter are juridical persons and 'citizens' and the former are not is to base a distinction upon an inadequate and irrelevant difference. They assert, with considerable merit, that it is not good judicial administration, nor is it fair, to remit a labor union or other unincorporated association to vagaries of jurisdiction determined by the citizenship of its members and to disregard the fact that unions and associations may exist and have an identity and a local habitation of their own'' (382 U.S. at 149-150).

Nevertheless, the Court concluded that it should not itself expand the powers conferred on the Courts by Congress beyond theretofore settled boundaries. ''[T]hese arguments, however appealing, are addressed to an inappropriate forum, and . . . pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts'' (*id.* at 150-151).

There is nothing in that which has any relevance to venue. To hold that an unincorporated association is an aggregation of individuals for jurisdictional purposes is to avoid judicial expansion of the authority of the Courts conferred upon them by Congress pursuant to Article III of the Constitution—to avoid changing established boundaries of federal jurisdiction. On the other hand, to hold that an unincorporated association is an aggregation of individuals for venue purposes would be to overturn entirely venue doctrines that have been the law for the past

25 years. There is no reason why different rules should not exist in the two different areas of the law. The rules differ because the considerations which underlie them differ. "The jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress. . . . But the locality of a law suit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants . . ."; thus, for example, jurisdiction is "beyond the scope of litigants to confer," but venue "is subject to their disposition." *Neirbo Co.* v. *Bethlehem Corp.*, 308 U.S. 165, 167-168 (1939). "Venue in the federal courts is not a jurisdictional concept. . . . We should not think about it in the metaphysical terms which have often been associated with considerations of jurisdiction. Venue is a concept of convenience." *Rutland Railway Corp.* v. *Brotherhood of Locomotive Engineers, supra,* 307 F.2d at 29. In short, the decision below, by extending the principles expressed in *Steelworkers* to the law of venue, would change established law as to venue, developed in response to considerations of convenience, on the strength of a decision that *refused* to change established law as to jurisdiction, developed in response to quite different considerations.

The inapplicability of *Steelworkers* to the determination of venue under the general venue statute is emphasized by the fact that the Court below, while purporting to be guided by *Steelworkers,* in actuality refused to follow the principles expressed in that decision. As we have shown, *Steelworkers* and similar decisions state that a union or other unincorporated association is not to be regarded as a jural entity and thus a "citizen" for diversity jurisdiction purposes, even though it has the capacity to sue and be sued in its own name, but is to be regarded as a mere aggregation of individuals each of whom is deemed to be a party to the lawsuit for purposes of determining whether diversity

exists. If a similar approach should be applied in determining the residence of "all defendants" under the general venue statute, venue with respect to the Brotherhood of Railroad Trainmen would not exist in any judicial district for purposes of this case. All members of the Brotherhood would be deemed to be "defendants" and since its members are scattered throughout 48 states, there would be no district in which "all defendants reside." All defendants would no more reside in the Northern District of Ohio, where the Brotherhood's headquarters are located, than in the District of Colorado; yet the Court below indicated that venue would exist in the Northern District of Ohio, not because that is where "all defendants reside" if the Brotherhood is not regarded as a jural entity, but because that is where its headquarters are located.

Indeed, if the diversity jurisdiction cases are examined in practical rather than conceptual terms, the consequences of applying the same principles under the general venue statute would be that a union or other unincorporated association resides in each judicial district in which one or more of its members resides. In cases such as *Steelworkers*, the union or association sues or is sued in its own name. Realistically, the citizenship of the union or association for purposes of diversity jurisdiction is in issue, not that of its members who are not in fact parties to the litigation. The citizenship of the members is material not because they are litigants, but because the true litigant—the union or association—is deemed to be a citizen of each state in which one or more of its members is a citizen. If this same practical approach is taken to the general venue statute, the Brotherhood of Railroad Trainmen "resides" in each judicial district in which one or more of its members resides, including the District of Colorado. Hence, "all defendants reside" in that district and venue was properly laid therein.

For reasons which we have already stated, we believe that *Steelworkers* and similar diversity jurisdiction decisions are irrelevant to the issue of venue. But if this Court is of a contrary view, we think the preferable and more defensible result would be to hold that the Brotherhood resides in each district in which one or more of its members resides. The Brotherhood, rather than its members (except those named as defendants), is the defendant in fact and should be regarded as the defendant for the purpose of determining where "all defendants reside." Moreover, the contrary approach would mean that for many years Congress did not provide for venue in any federal court of federal question litigation brought against any union or other unincorporated association which happened to have members residing in more than one judicial district. Congress could not have intended such an absurd result. But, however that may be, under no conceivable theory can it be said that the principles expressed in *Steelworkers* and similar cases support the conclusion that a union or association resides at the location of its general headquarters for purposes of the venue statute.

We submit, therefore, that *Steelworkers* lends no support to the determination below that the Brotherhood resides only at the location of its national headquarters, for purposes of the general venue statute, and does not reside in Colorado. Support for that determination can only be found in those few decisions, all of which antedate *Rutland*, applying by analogy the tests developed for corporations prior to 1948. For reasons advanced in the *Sperry Products* decision, we agree that the only sensible tests of residence are tests already developed for corporations, which large labor unions resemble in the extent and variety of their multi-state operations—indeed, it is hard to conceive of any reasonable alternative. And for the reasons advanced in the *Rutland* decision, we submit that the appro-

priate corporate analogy is to the law regarding corporations today, not to the law as it existed two decades ago. We show in the next section of this brief that the *Rutland* result, which permits suit wherever the unincorporated association is doing business, is the only sound result in terms of venue policy.

II. Sound Venue Policy Supports the Rutland Rule

The *Rutland* holding—that unincorporated associations reside wherever they do business rather than only at their principal office—is sound as a matter of venue policy. Like corporations, large labor unions conduct their business throughout the nation. Like corporations, their activities frequently injure others. The headquarters district of a large union may be far removed from the scene of those activities, from the participants in them, and from the persons injured by them. Consequently, in many cases in which union activities give rise to litigation, the district of the union's headquarters is an exceedingly inconvenient forum both for plaintiffs and for defendant unions. Venue rules that tend to restrict suit to the district of the union's headquarters serve only to insulate unions from local responsibility for their activities. In such circumstances, we submit, sound venue policy supports the *Rutland* rule. The manner in which the Brotherhood of Railroad Trainmen performs its representation function under the Railway Labor Act, in connection with the kinds of disputes which are most productive of railway labor litigation, illustrates the point.

The Brotherhood of Railroad Trainmen, like all other national railway labor organizations and (we suspect) like most national labor unions, consists of a national entity, the Grand Lodge, and numerous local ("subordinate") lodges on nearly all the carriers on which the Brotherhood

holds representation rights (Const. Sec. 1).[10] The Brotherhood's Constitution provides that the Grand Lodge "has exclusive jurisdiction over all the subjects pertaining to the Brotherhood," and that "its enactments and decisions upon all questions are the supreme law of the Brotherhood" (Const. Sec. 6). The Grand Lodge consists of a President, an Assistant to the President, fifteen Vice Presidents, eight alternate Vice Presidents, a number of other officials, and one delegate from each local lodge (Const. Sec. 2). The President presides at conventions of the Grand Lodge, performs "its executive duties when it is not in session," exercises "general supervision" over the Brotherhood's affairs, grants and signs charters of local lodges, is empowered to "adjust all grievances referred to him" by general grievance committees of subordinate lodges under the Brotherhood's General Rules, and has a variety of other miscellaneous duties (Const. Sec. 9). The Assistant to the President and the Vice Presidents assist the President in the discharge of these duties (Const. Sec. 10, 11).

Local lodges consist of at least ten members and are chartered by the President (Const. Sec. 75). Local lodges have jurisdiction assigned to them by the President over all members of the Brotherhood residing within their limits or employed on the system which they represent (Const. Sec. 79); in general, there is at least one local lodge on each railroad on which the Brotherhood holds representation rights and on large railroads there are a great many such lodges. Like the Grand Lodge, each local lodge has a set of officers headed by a President (Const. Sec. 81-82).

The Brotherhood—the national entity—is designated as the employees' representative under the Railway Labor Act. Under the Brotherhood's Constitution and General

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[10] The provisions of the Constitution and General Rules of the Brotherhood of Railroad Trainmen (1964), cited in this section of this brief, are set out in Appendix C, p. 49, *infra*.

Rules, the Brotherhood performs its representation function primarily through its local lodges and more specifically through grievance committees established by the local lodges (Const. Sec. 101; Gen. Rule Nos. 3-14). Each local lodge has a grievance committee—the local grievance committee (Const. Sec. 84; Gen. Rule No. 1(a)). Each local grievance committee consists of three members, a Chairman (the "Local" Chairman), a Vice Chairman and a Secretary (Gen. Rule No. 1(a)). The members of the Committee are elected by the lodge members they represent (Gen. Rule No. 1(a)). On each railroad on which there are more than three local lodges, there is also at least one general grievance committee consisting of the chairmen of the local grievance committees (Gen. Rule No. 2(a)). Each general grievance committee has a chairman—the "General Chairman"—elected either by the members of the committee or by referendum of the members of the Brotherhood within the jurisdiction of the committee (Gen. Rule No. 2(a)). In general, the local and general grievance committees act through their chairmen (Const. Sec. 101; Gen. Rule No. 4).

The manner in which the Brotherhood performs its representation function can best be described in terms of the principal kinds of disputes in railway labor relations: As in labor relations generally, the majority of railway labor disputes concern either the application of existing agreements, or the making of new agreements. These are the so-called "minor" and "major" disputes of the railway labor world. See generally *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 722-28 (1945).

Under the Railway Labor Act, "minor" disputes—"disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning

rates of pay, rules, or working conditions" (45 U.S.C. § 153 First (i))—are initially handled "on the property" on which they arise, in accordance with grievance procedures prescribed in the parties' contracts. If such disputes are not resolved at the level of "the chief operating officer of the carrier designated to handle such disputes," they may then be submitted either to the National Railroad Adjustment Board (45 U.S.C. § 153 First (i)) or to a special board of adjustment (45 U.S.C. § 153 Second). If a carrier declines to comply with an award of an adjustment board, the matter may be made the subject of enforcement proceedings in court (45 U.S.C. § 153 First (p)). Strikes over these disputes are unlawful at any stage and may be enjoined. *Trainmen* v. *Chicago, R. & I. R. Co.*, 353 U.S. 30 (1957); *Locomotive Engrs.* v. *L. & N. R. Co.*, 373 U.S. 33, 42 (1963).

Under the Railway Labor Act, "major" disputes—disputes concerning proposed changes "in agreements affecting rates of pay, rules, or working conditions" (45 U.S.C. § 156)—are initiated by service of a 30-day notice of intended change on the other party to the dispute (45 U.S.C. § 156). Thereafter, the parties must confer (45 U.S.C. § 156); and if the dispute is not settled, it is then subject successively to mediation by the National Mediation Board (45 U.S.C. § 155), a proffer of arbitration (45 U.S.C. §§ 155, 157-159), and possible consideration by a Presidential Emergency Board (45 U.S.C. § 160). Only after those procedures are exhausted may a union strike to compel a change in the agreement or may a railroad unilaterally change rules previously embodied in an agreement. Such self-help at any earlier stage is unlawful and may be enjoined. *Norfolk & P.B.L. R. Co.* v. *Brotherhood of Rail. Train.*, 248 F.2d 34, 45-46 (4th Cir. 1957) (alternative holding); *Pennsylvania Railroad Co.* v. *Transport Wkrs. Union,*

202 F. Supp. 134, 137 (E.D. Pa. 1962); *Western Air Lines* v. *Flight Engineers Internat'l Ass'n.*, 194 F. Supp. 908, 910-911 (S.D. Cal. 1961); *Pennsylvania Railroad Co.* v. *Transport Workers Union*, 191 F. Supp. 915, 921 (E.D. Pa. 1960), *aff'd*, 280 F.2d 343 (3d Cir. 1960); *Chicago, Rock Island & Pac. R. Co.* v. *Switchmen's Union*, 187 F. Supp. 581, 584 (W.D.N.Y. 1960), *rev'd on other grounds*, 292 F.2d 61 (2d Cir. 1961); *American Airlines* v. *Air Line Pilots Ass'n*, 169 F. Supp. 777, 783-789 (S.D.N.Y. 1958); see also dicta in *Eastern Air Lines, Inc.* v. *Flight Engineers Internat'l Ass'n.*, 340 F.2d 104, 106 (5th Cir. 1965); *Missouri-Illinois R. Co.* v. *Order of Railway Conductors*, 322 F.2d 793, 796 (8th Cir. 1963); *Pan American World Air.* v. *Flight Eng. Intern. Assoc.*, 306 F.2d 840, 846 (2d Cir. 1962); *Chicago River & Indiana R. Co.* v. *Brotherhood of Rail. T.*, 229 F.2d 926, 930-931 (7th Cir. 1956), *aff'd*, 353 U.S. 30.

The Brotherhood's Constitution and General Rules prescribe the manner in which the Brotherhood performs its representation function in connection with both "minor" and "major" disputes. With respect to "minor" disputes, in the absence of written notice to the contrary in individual cases, members of the Brotherhood grant "complete authority to the Brotherhood and any of its constituted representatives" to handle their claims and grievances against railroads as the Brotherhood's representatives see see fit (Gen. Rule No. 14). Individuals having claims and grievances against railroads are required to submit them to their local lodge (Gen. Rule No. 5). If the local lodge "sustains" the claim or grievance, the local grievance committee, ordinarily acting through the local chairman, presents the claim or grievance to appropriate railroad officials at the operating level (Gen. Rule No. 5; Const. Sec. 101). If a satisfactory adjustment of the dispute is not obtained in that fashion, the matter may then be referred to the

general grievance committee, which is required to investigate the matter and has the power to amend any part or all of any claim submitted to it (Gen. Rule Nos. 3, 5). If the general grievance committee undertakes to press the claim or grievance, it seeks adjustment of the dispute by the highest railroad official authorized to deal with such matters (Gen. Rule No. 3). If that proves unavailing, the General Chairman may then submit the matter to an adjustment board under the Section 3 of the Railway Labor Act, as General Chairman Carroll did with respect to the "minor" disputes out of which this case arose. Thus, in representing employees in connection with "minor" disputes, the Brotherhood's principal activities are primarily at the scene of such disputes—not in Cleveland, where the national union is headquartered.

With respect to "major" disputes, under the Brotherhood's Constitution and General Rules the Brotherhood likewise acts principally through its local officials except in cases handled in so-called "national movements" on a multi-employer basis.[11] The General Chairmen serve or are served with the initial Section 6 notices and are the union participants in the prescribed conferences and participate also in any mediation (Gen. Rule No. 3). However, if the general grievance committee fails to obtain a satisfactory disposition of the matter, the committee may request assistance from the President of the Brotherhood (Gen. Rule No. 12). In such cases, the President, or his representative (one of the Vice Presidents), meets with the general

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[11] Where substantially the same proposals are served by or upon a number of railroads at about the same time, and the dispute is not settled in the initial conferences on the individual properties, thereafter the negotiations are conducted on a multicarrier basis between national representatives of the union and carriers involved. See *Atlantic Coast Line R. Co. v. Brotherhood of Railroad Trainmen*, 262 F.Supp. 177 (D.D.C. 1967) (appeal pending); *Kennedy* v. *Long Island R. Co.*, 211 F.Supp. 478, 488 (S.D.N.Y. 1962), *aff'd*, 319 F.2d 366 (2d Cir. 1963), *cert. denied*, 375 U.S. 830.

grievance committee and attempts to affect satisfactory disposition of the dispute (Gen. Rule No. 12). If a strike is deemed necessary it must be sanctioned both by the general grievance committee and the President (Gen. Rule No. 12). "In the event of a strike, the President of the Brotherhood shall be the recognized leader" (Gen. Rule No. 13) and strikes are financed by the national organization from a fund established for that purpose (Gen. Rule Nos. 18-23). Members who engage in strikes not authorized in the manner just described are subject to expulsion from the Brotherhood (Gen. Rule No. 15). Thus, the activities of the Brotherhood with respect to "major" disputes, except those which are a part of "national movements," are centered primarily at the scene of such disputes, rather than in Cleveland. But ultimate control—the authority to say when strikes may start and when they must stop—resides in the Brotherhood's President (Gen. Rule No. 12).

These "major" and "minor" disputes give rise to numerous law suits both by unions against railroads and by railroads against unions. It is suits of the latter variety with which we are concerned in this case. Suits by railroads against unions include, of course, suits to enjoin unlawful strikes over "minor" disputes (*e.g., Trainmen* v. *Chicago, R. & I. R. Co., supra; Locomotive Engrs.* v. *L. & N. R. Co., supra*), suits to enjoin unlawful premature strikes over "major" disputes (*e.g.*, cases cited at pp. 30-31, *supra*), and suits to recover damages for unlawful strikes —of which this case is an example.[12] Numerous actions are also instituted to resolve all manner of disputes as to

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[12] For authority for the recovery of damages for Railway Labor Act violations, see *Steele* v. *L. & N. R. Co.*, 323 U.S. 192, 207 (1944); *Brotherhood of Locomotive Firemen* v. *Tunstall*, 163 F.2d 289 (4th Cir. 1947), *cert. denied*, 332 U.S. 841; see also *Kennedy* v. *Long Island R. Co.*, 211 F.Supp. 478, 480 (S.D. N.Y. 1962), *aff'd*, 319 F.2d 366 (2d Cir. 1963), *cert. denied*, 375 U.S. 830. *Contra: Louisville & Nashville R. Co.* v. *Brown*, 252 F.2d 149 (5th Cir. 1958).

the procedures required by the Railway Labor Act with respect to particular controversies and the parties' statutory obligations with respect thereto.

As is evident from the foregoing description of the handling of the "major" and "minor" disputes under the Railway Labor Act and the Brotherhood's Constitution and General Rules, the principal activities on the part of both parties to a dispute which becomes the subject of litigation, often take place exclusively at the site of the particular railroad involved, and some of the relevant activities almost always are so located. That is the site of any injury which the Brotherhood's activities cause. Most of the principal participants and witnesses, both from the Brotherhood and for the railroad, often are located there. Similarly, the relevant records of both the Brotherhood and the railroad in many instances would be located only at the General Chairman's office and at the railroad's principal office, both of which are located in the vicinity of the railroad. That remains true even in the many cases in which the Brotherhood's President directs the activities which become the subject of litigation—as in the case of strikes.

In consequence, the district of the Brotherhood's national headquarters frequently would be a forum having relatively little connection with a dispute, and a trial in that district could be extremely burdensome and inconvenient. Not only would the relevant records and witnesses often be located at a great distance from that district, but an immense burden would be imposed upon the district court—litigation by *all* railroads against the Brotherhood would be concentrated in the single district where its national headquarters are located. These burdens and inconveniences could not be alleviated, moreover, by transfers under 28 U.S.C. § 1404(a), as cases may be transferred thereunder only to jurisdictions in which venue exists. *Hoffman* v. *Blaski*, 363 U.S. 335 (1960).

Accordingly, a rule which would tend to require trial of these cases at the district of the Brotherhood's national headquarters would be inconsistent with the fundamental purposes of venue legislation. Venue "relates to the convenience of litigants. . . ." *Neirbo Co.* v. *Bethlehem Corp., supra*, 308 U.S. at 168. "[C]ourts affix to conduct consequences as to place of suit consistent with the policy behind [venue legislation], which is 'to save defendants from inconveniences to which they might be subjected if they could be compelled to answer in any district, or wherever found.'" *Ibid.* Since trials of these suits against unions at the unions' headquarters district ordinarily would be equally inconvenient for both the railroads and the unions, there is no justification in fundamental venue policy for imposing rules which would tend to restrict venue to that district. Rather, the *Rutland* rule, which would permit trial wherever the union does business, would clearly be more "consistent with the policy behind" the venue statute.

Further, the imposition of rules which tend to restrict venue to the district in which national union headquarters are located—rules which cannot be justified in terms of the policy behind the venue statute—would have all the very serious disadvantages of the pre-1948 rule limiting the residence of corporations to a single district. Remedies should be available at the places where wrongs occur. That is true in all cases, if for no other reason than that increasing the cost of litigation inhibits the redress of injuries. And it is a matter of particular importance in cases involving unlawful strikes. In such cases, effective relief must be available immediately, or irreparable injury, both to the railroads and to the public they serve, would be the inevitable consequence. Ordinarily, immediate relief would be available only at the scene of a strike—not in Cleveland where there are no witnesses to it. See F.R.C.P. 65(b).

To be sure, railroads might seek relief locally against local Brotherhood officials, but to be fully effective relief must run against the real adversary, the Brotherhood itself. The President of the Brotherhood is the "leader" of any authorized strike and has authority to "sanction" and to "terminate" it (Gen. Rule No. 12), and only the Brotherhood, not its locals, is likely to be responsible financially. Thus, the price of a rule which would tend to restrict venue to the district of an association's principal place of business would be the "intolerable" price which led Congress in 1948, when it enacted Section 1391(c), to abrogate the similar rule regarding corporations:

> "The rationale of this sharp break with ancient formulae is quite obviously a response to a general conviction that it was 'intolerable if the traditional concepts of "residence" and "presence" kept a corporation from being sued wherever it was creating liabilities.'" *Pure Oil Co.* v. *Suarez,* 384 U.S. 202, 204 n. 3 (1966).[13]

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[13] "There is a shocking inconsistency in a rule of law which permits a corporation to maintain a regular, established place of business in the district in question, transact a substantial amount of business there both before and after the event about which the plaintiff complains and at the time the suit is filed with the expressed intention to continue doing business in such locale, but allows the corporation to insist on a trial of the factual issues in the district in which it is incorporated or in which its principal office is located. To do so would authorize it 'to run with the hare and hold with the hound.'

"In the doing of substantial business in an area a corporation becomes a part of the mainstream of commerce which affects the welfare of many people including those it may negligently injure. It receives the benefits which normally come to those engaged in business in the area. The right to choose to do substantial business in a particular locality does not have to be exercised. However, once the choice is made it would be unjust to permit the offending corporation to continue its operations, in the course of which it also may be creating liabilities, and at the same time to grant

Since a venue rule limiting the residence of an unincorporated association to the district of the association's principal place of business does not serve the purpose of the policy behind the venue statute, but instead is quite inconsistent with that policy, there is no reason whatever for exacting from those who have dealings with unions the "intolerable" price of such a rule. Since Congress has not provided an express statutory test for the residence of unincorporated associations, the courts must devise the test. It obviously is preferable to devise a test that serves the policy of venue legislation—the convenience of litigants—rather than a test that is inconsistent with that policy. *Rutland* and cases like it have devised a test which serves that policy; holding that an unincorporated association resides only at its principal place of business would not. In short, as Professor Moore has observed with respect to the holdings in *Rutland* and similar cases (1 Moore's Federal Practice (2d ed.), p. 1508):

> "The position taken by these courts is desirable and there is a built-in protection from abuse contained in 28 USC § 1404(a). Although 28 USC § 1391(c) does not on its face apply to unincorporated associations, where an unincorporated association carries on multistate activities, application of its principle is certainly justified."

We submit that labor unions should be held to reside wherever they are doing business.

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it complete immunity from those liabilities by shielding it with a carapace of technical venue construction. Usually the witnesses, the evidence, and all the facts leading to the ultimate inquiry as to the truth could be presented more effectively and with less inconvenience than would be possible at the residence or principal place of business of the corporation, often a substantial distance from the place of the wrong. Such a principle cuts two ways and may serve both plaintiff and defendant alike." *Pure Oil Co.* v. *Suarez*, 346 F.2d 890, 896-897 (5th Cir. 1965), *aff'd*, 384 U.S. 202.

Conclusion

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX A

Members of the National Railway Labor Conference

Class I Railroads

Akron, Canton & Youngstown
Ann Arbor
Atchison, Topeka & Santa Fe
Atlantic Coast Line
Baltimore and Ohio
Bangor and Aroostook
Bessemer and Lake Erie
Boston and Maine
Canadian Pacific Lines
Central of Georgia
Central RR of New Jersey
Central Vermont
Chesapeake and Ohio
Chicago & Eastern Illinois
Chicago & Illinois Midland
Chicago and North Western
Chicago, Burlington & Quincy
Chicago Great Western
Chicago, Milwaukee, St. Paul & Pacific
Chicago, Rock Island & Pacific
Clinchfield
Colorado and Southern
Delaware and Hudson
Denver and Rio Grande Western
Detroit and Toledo Shore Line
Detroit, Toledo and Ironton
Duluth, Missabe and Iron Range
Duluth, Winnipeg and Pacific
Elgin, Joliet and Eastern
Erie Lackawanna
Fort Worth and Denver
Georgia
Grand Trunk Western
Great Northern
Gulf, Mobile and Ohio

Illinois Central
Illinois Terminal
Kansas City Southern
Lake Superior & Ishpeming
Lehigh Valley
Long Island
Louisiana & Arkansas
Louisville & Nashville
Maine Central
Missouri-Kansas-Texas
Missouri Pacific
Monon
New York Central System
New York, New Haven and Hartford
Norfolk and Western
Norfolk Southern
Northern Pacific
Northwestern Pacific
Pennsylvania
Pennsylvania-Reading Seashore
Piedmont and Northern
Pittsburgh & Lake Erie
Reading
Richmond, Fredericksburg & Potomac
St. Louis-San Francisco
St. Louis Southwestern
Seaboard Air Lines
Soo Line
Southern Pacific
Southern Railway System
  Alabama Great Southern
  Cincinnati, New Orleans and Texas Pacific
  Georgia Southern & Florida
  New Orleans and Northeastern
Spokane, Portland and Seattle
Texas and Pacific
Toledo, Peoria & Western
Union Pacific
Western Maryland
Western Pacific

Class I Switching and Terminal Companies

Alton & Southern
Baltimore & Ohio Chicago Terminal
Belt Railway Company of Chicago
Boston Terminal
Chicago & Western Indiana
Chicago River & Indiana
Chicago Union Station
Cincinnati Union Terminal
Cleveland Union Terminals
Houston Belt & Terminal
Indiana Harbor Belt
Indianapolis Union
Kansas City Terminal
Kentucky & Indiana Terminal
Minnesota Transfer
Monongahela Connecting
Newburgh & South Shore
Ogden Union Railway & Depot
Portland Terminal
Portland Terminal Railroad
Port Terminal Railroad Association
Terminal R.R. Association of St. Louis
Union R.R. (Penna.)
Washington Terminal

APPENDIX B

Employee Representation on Selected Rail Carriers

as of June 30, 1965

From Table 10, Thirty-First Annual Report of the National Mediation Board, pp. 78-83

TABLE 10.—*Employee representation on selected rail carriers as of June 30, 1965*

Railroad	Engineers	Firemen and hostlers	Conductors	Brakeman, flagmen and baggagemen	Yard-foremen, helpers and switchtenders	Yard-masters	Clerical office, station, storehouse	Maintenance-of-way employees	Telegraphers	Dispatchers
Akron, Canton & Youngstown Ry	BLE	BLF&E	BRT	BRT	BRT	BRT	BRC	BMW	TCEU	ATDA.
Ann Arbor RR	BLF&E	BLF&E	BRT	BRT	BRT	ARSA	BRC	BMW	TCEU	ATDA.
Atchison, Topeka & Santa Fe Ry	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Gulf, Colorado & Santa Fe Ry	BLE	BLF&E	ORCB	BRT	BRT	RYA	(1)	(1)	(1)	(1).
Panhandle & Santa Fe Ry	BLE	BLF&E	ORCB	BRT	BRT	RYA	(1)	(1)	(1)	(1).
Atlanta & West Point RR	BLE	BLF&E	BRT	BRT	BRT	X	BRC	BMW	TCEU	ATDA.
Atlantic Coast Line RR	BLE	BLF&E	ORCB	BRT	BRT	RYNA	BRC	BMW	TCEU	ATDA.
Baltimore & Ohio RR	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Bangor & Aroostock RR	BLF&E	BLF&E	BRT	BRT	BRT	X	BRC	BMW	TCEU	ATDA.
Bessmer & Lake Erie RR	BLF&E	BLF&E	BRT	BRT	BRT	X	BRC	BMW	TCEU	X.
Boston & Maine RR	BLE	BLF&E	BRT	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Central of Georgia Ry	BLE	BLF&E	BRT	BRT	SUNA	RYA	BRC	BMW	TCEU	ATDA.
Central RR. of New Jersey	BLE	BLF&E	ORCB	BRT	BRT	RYNA	BRC	BMW	TCEU	ATDA.
Central Vermont Ry	BLE	BLF&E	BRT	BRT	BRT	BRT	BRC	BMW	TCEU	ATDA.
Chesapeake & Ohio Ry	BLE	BLF&E	ORCB	BRT	BRT	RYNA	BRC	BMW	TCEU	ATDA.
Chicago & Eastern Illinois RR	BLE	BLFPE	BRT	BRT	BRT	ARSA	BRC	BMW	TCEU	ATDA.
Chicago & Illinois Midland Ry	BLE	BLF&E	BRT	BRT	BRT	X	BRC	BMW	TCEU	ATDA.
Chicago & North Western Ry	BLE	BLF&E	ORCB	BRT	BRT-ORCB.	RYA	BRC	BMW	TCEU	ATDA.
Chicago, Burlington & Quincy RR	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Chicago, Great Western Ry	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Chicago, Milwaukee, St. Paul & Pacific RR	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Chicago, Rock Island & Pacific Ry	BLE	BLF&E	BRT	BRT	SUNA	RYA	BRC	BMW	TCEU	ATDA.
Clinchfield RR	BLE	BLF&E	ORCB	BRT	SUNA	RYA	BRC	BMW	TCEU	ATDA.
Colorado & Southern Ry	BLE	BLF&E	ORCB	BRT	BRT	BRT	BRC	BMW	TCEU	ATDA.
Colorado & Wyoming Ry	BLF&E	BLF&E	BRT	BRT	BRT	BRT	BRC	BMW	(1)	(1).
Delaware & Hudson RR	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Denver & Rio Grande Western RR	BLE	BLF&E	ORCB	BRT	SUNA	RYA	BRC	BMW-SMWIA.	TCEU	ATDA.
Detroit & Toledo Shore Line RR	BLF&E	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Detroit, Toledo & Ironton RR	BLE	BLF&E	BRT	BRT	BRT	X	BRC	BMW	TCEU	ATDA.
Duluth, Missabe & Iron Range Ry	BLF&E	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Duluth, Winnipeg & Pacific Ry	BLF&E	BLF&E	BRT	BRT	BRT	X	BRC	BMW	TCEU	ORT.
Elgin, Joliet & Eastern	BLE	BLF&E	ORCB	BRT	BRT	BRT	BRC	BMW	TCEU	ATDA.
Erie Lackawanna RR	BLE	BLF&E	BRT	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Florida East Coast Ry	BLE	IARE-BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Fort Worth & Denver Ry	BLE	BLF&E	ORCB	BRT	SUNA	RYA	BRC	BMW	TCEU	ATDA.

Georgia & Florida RR	BLE	BLF&E	BRT	BRT	BRT	(1)	BRC	BMW	TCEU	ATDA.
Georgia RR., Lessee org	BLE	BLE	ORCB	BRT	BRT	ORCB	BRC	BMW	TCEU	ATDA.
Grand Trunk Western RR	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Great Northern Ry	BLE	BLF&E	ORCB	ORCB	SUNA	RYA	BRC	BMW	TCEU	(3).
Green Bay & Western RR	BLFE	BLF&E	BRT	BRT	BRT	(1)	BRC	BMW	TCEU	ATDA.
Gulf Mobile & Ohio RR	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	SA.
Illinois Central RR	BLE	BLF&E	ORCB	BRT	BRT	SA	BRC	BMW	TCEU	ATDA.
Illinois Terminal RR	BLF&E	BLF&E	BRT	BRT	BRT	BRT	BRC	BMW	TCEU	ATDA.
Kansas City Southern Ry	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	(3).
Kansas, Oklahoma & Gulf Ry	BLF&E	BLF&E	ORCB	BRT	BRT	(3)	BRC	BMW	(3)	(3).
Lake Superior & Ishpeming RR	BLE	BLF&E	BRT	BRT	BRT	(3)	BRC	BMW	TCEU	ATDA.
Lehigh & Hudson River Ry	BLE	BLF&E	BRT	BRT	BRT	RYA	BRC	BMW	BRC	ATDA.
Lehigh & New England RR	BLF&E	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Lehigh Valley RR	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	LU.
Long Island RR	BLE	BLF&E	BRT	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Louisiana & Arkansas Ry	BLE	BLF&E-LU.	ORCB	BRT-LU.	BRT-LU.	RYA	BRC	BMW	TCEU	ATDA.
Louisville & Nashville RR	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Maine Central RR	BLE	BLF&E	BRT	BRT	BRT	BRT	BRC	BMW	TCEU	ATDA.
Midland Valley RR	BLE	BLF&E	BRT	BRT	BRT	BRT	BRC	BMW	TCEU	ATDA.
Mississippi Central RR	BLE	BLE	BRT	BRT	BRT	(1)	BRC	BMW	TCEU	ATDA.
Missouri-Kansas-Texas RR	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	(1)	(1).
Missouri-Kansas-Texas RR. of Texas	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1).
Missouri Pacific RR	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Monon RR	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Monongahela Ry	BLE	BLF&E	ORCB	BRT	BRT	RYNA	BRC	BMW	TCEU	ATDA.
Montour RR	BLE	BLF&E	BRT	BRT	BRT	(3)	BRC	BMW	(3)	(3).
Nevada Northern Ry	BLF&E	BLF&E	BRT	BRT	(3)	(3)	(3)	MMS	(3)	ATDA.
New York Central RR	BLE	BLE	BRT	BRT	BRT	RYNA	BRC	BMW	TCEU	ATDA.
Ohio Central Lines	BLE	BLF&E	ORCB	BRT	BRT	RYNA	(1)	(1)	(1)	(1).
Cleveland, Cincinnati, Chicago & St. Louis Ry.	BLE	BLF&E	ORCB	BRT	BRT	RYNA	BRC	BMW	TCEU	ATDA.
Michigan Central RR	BLE	BLF&E	ORCB	BRT	BRT	RYNA	BRC	BMW	TCEU	ORT.
Boston & Albany RR	BLE	BLF&E	ORCB	BRT	BRT	RYNA	BRC	BMW	TCEU	ATDA.
New York, Chicago & St. Louis RR	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
New York, New Haven & Hartford RR	BLE	BLF&E	BRT	BRT	BRT	SA	BRC	BMW	TCEU	ATDA.
New York, Susquehanna & Western RR	BLE	BLF&E	ORCB	BRT	BRT	BRT	BRC	BMW	TCEU	TCEU.
Norfolk & Western Ry	BLE	BLF&E	ORCB	BRT	BRT	(3)	BRC	BMW	TCEU	ATDA.
Norfolk Southern Ry	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Northern Pacific Ry	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Northwestern Pacific RR	BLE	BLF&E	BRT	BRT	ORCB-BRT.	(3)	BRC	BMW	TCEU	ATDA.
Pennsylvania RR	BLE	BLF&E	BRT	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Pennsylvania Reading Seashore Lines	BLE	BLF&E	BRT	BRT	BRT	BRT	BRC	BMW	TCEU	ATDA.
Pittsburgh & Lake Erie RR	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Pittsburgh & Shawmut RR	BLF&E	BLF&E	BRT	BRT	(3)	(3)	(3)	BMW	(3)	ATDA.
Pittsburgh & West Virginia Ry	BLE	BLF&E	BRT	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.

See footnote at end of table.

TABLE 10.—*Employee representation on selected rail carriers as of June 30, 1965*—Continued

Railroad	Engineers	Firemen and hostlers	Conductors	Brakeman, flagmen and baggagemen	Yardforemen, helpers and switchtenders	Yardmasters	Clerical office, station, storehouse	Maintenance-of-way employees	Telegraphers	Dispatchers
Reading Co	BLE	BLF&E	ORCB	BRT	BRT	BRT	BRC	BMW	TCEU	ATDA.
Richmond, Fredericksburg & Potomac RR	BLE	BLE	ORCB	ORCB	BRT	RYNA	BRC	BMW	TCEU	ATDA.
St. Louis-San Francisco Ry	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
St. Louis Southwestern Ry	BLE	BLF&E	BRT	BRT	BRT	BRT	BRC	BMW	TCEU	ATDA.
San Diego & Arizona Eastern Ry	BLE	BLE	ORCB	ORCB	BRT	(2)	BRC	BMW	TCEU	(2).
Seaboard Air Line RR	BLE	BLF&E	ORCB	BRT	BRT	RYNA	BRC	BMW	TCEU	ATDA.
Soo Line RR. Co	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Southern Pacific Co. (Pacific Lines)	BLE	BLF&E	ORCB	BRT	SUNA	RYNA	BRC	BMW	TCEU	ATDA.
Southern Pacific Co. (Texas and Louisiana Lines)	BLE	BLF&E	BRT	BRT	SUNA	BRT	BRC	BMW	TCEU	ATDA.
Southern Ry	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Georgia, Southern Florida Ry	BLF&E	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Cincinnati, New Orleans & Texas Pacific Ry	BLE	BLF&E	ORCB	BRT	BRT	RYA	(1)	(1)	TCEU	(1).
New Orleans & Northeastern RR	BLE	BLF&E	ORCB	BRT	SUNA	RYA	(1)	(1)	(1)	(1).
Alabama Great Southern Ry	BLE	BLF&E	ORCB	BRT	BRT	RYA	(1)	(1)	(1)	(1).
Spokane International RR	BLF&E	BLF&E	ORCB	ORCB	SUNA	RYA	BRC	BMW	TCEU	LU.
Spokane, Portland & Seattle Ry	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Staten Island Rapid Transit Ry	BLE	BLE	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Tennessee Central Ry	BLE	BLF&E	ORCB	BRT	BRT	BRT	BRC	BMW	TCEU	ATDA.
Texas & Pacific Ry	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Texas Mexican Ry	BLE	BLF&E	BRT	BRT	BRT	(2)	BRC	BMW	(2)	(2).
Toledo, Peoria & Western RR	BLF&E	BLF&E	BRT	BRT	BRT	(2)	BRC	BMW	TCEU	(2).
Union Pacific RR	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Utah Ry	BLE	BLE	ORCB	ORCB	BRT	(2)	(2)	BMW	TCEU	ATDA.
Wabash RR	BLE	BLF&E	ORCB	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Western Maryland Ry	BLF&E	BLF&E	BRT	BRT	BRT	RYA	BRC	BMW	TCEU	ATDA.
Western Pacific RR	BLE	BLF&E	ORCB	BRT	SUNA	RYA	BRC	BMW	TCEU	ATDA.

TABLE 10.—*Employee representation on selected rail carriers as of June 30, 1965*—Continued

Railroad	Machinists	Boiler-makers, black-smiths	Sheet metal workers	Electrical workers	Carmen, coach cleaners	Power house employees, shop laborers	Signalmen	Mechanical foremen, supervisors	Dining-car stewards	Dining-car cooks and waiters
Akron, Canton & Youngstown Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	(2)	(2).
Ann Arbor R.R	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	(2)	(2).
Atchison, Topeka & Santa Fe Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS		(2)	(2).
Gulf, Colorado & Sante Fe Ry	(1)	(1)	(1)	(1)	(1)	(1)	(1)		(2)	(2).
Panhandle & Santa Fe Ry	(1)	(1)	(1)	(1)	(1)	(1)	(1)		(2)	(2).
Atlanta & West Point R.R	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS		BRT	HRE.
Atlantic Coast Line R.R	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	RED	BRT	UTSE.
Baltimore & Ohio R.R	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS		(2)	HRE.
Bangor & Aroostock R.R	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS		(2)	(2).
Bessemer & Lake Erie R.R	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	SA	UTSE.
Boston & Maine R.R	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	(4)	(2)	UTSE.
Central of Georgia Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	RED	(2)	(2).
Central R.R. of New Jersey	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	(2)	(2).
Central Vermont Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	BRT-HRE.	HRE.
Chesapeake & Ohio Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	BRT	HRE
Chicago & Eastern Illinois R.R	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	(2)	(2).
Chicago & Illinois Midland Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	ORCB	HRE.
Chicago & North Western Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	BRT	BSCP.
Chicago, Burlington & Quincy R.R	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	(2)	(2).
Chicago Great Western Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	(1)	BRT	HRE.
Chicago, Milwaukee, St. Paul & Pacific R.R	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	BRT	HRE.
Chicago, Rock Island & Pacific Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS		(2)	ORCB.
Clinchfield R.R	IAM	BB	SMWIA	IBEW	BRCA	BMW	BRS	ARSA	BRT	BSCP.
Colorado & Southern Ry	IAM	BB	SMWIA	(2)	BRCA	IBFO	(2)		(2)	(2).
Colorado & Wyoming Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS		BRT	HRE.
Delaware & Hudson R.R	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS		BRT	SA.
Denver & Rio Grande Western R.R	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS		(2)	(2).
Detroit & Toledo Shore Line R.R	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS		(2)	(2).
Detroit, Toledo & Ironton R.R	IAM	BB	SMWIA	IBEW	BRCA	IBFO	IBEW		(2)	(2).
Duluth, Missabe & Iron Range Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	(2)	(2).
Duluth, Winnepeg & Pacific Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS		(2)	(2).
Elgin, Joliet & Eastern Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	(3)	(2)	HRE.
Erie-Lackawanna R.R	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	(2)	(3).
Florida East Coast Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	LU	BRT	BSCP.
Fort Worth & Denver Ry	IAM	BB	SMWIA	(2)	BRCA	(2)	(2)		(2)	(2).
Georgia & Florida R.R	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS		(2)	(2).
Georgia R.R., Lessee org	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	BRT	HRE.
Grand Trunk Western RR										

Great Northern Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	(1)	BRT	HRE-ORCB.
Green Bay & Western RR	IAM	BB	SMWIA	(2)	BRCA	BMW	BRS		(2)	(2).
Gulf Mobile & Ohio RR	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	LU	HRE.
Illinois Central RR	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS		BRT	HRE.
Illinois Terminal RR	IAM	BB	SMWIA	IBEW	BRCA	IBFO	IBEW	ARSA	(2)	(2).
Kansas City Southern Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	(2)	HRE.
Kansas, Oklahoma & Gulf Ry	(2)	(2)	(2)	(2)	BRCA	IBFO	(2)		(2)	(2).
Lake Superior & Ishpeming	SA	SA	SA	(2)	SA	IBFO	(2)		(2)	(2).
Lehigh & Hudson River Ry	IAM	BB	(2)	(2)	BRCA	IBFO	BRS		(2)	(2).
Lehigh & New England RR	IAM	BB	SMWIA	IBEW	BRCA	(2)	(2)		(2)	(2).
Lehigh Valley RR	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	RED	BRT	HRE.
Long Island Railroad	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	(2)	(2).
Louisiana & Arkansas Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	RED	(2)	(2).
Louisville & Nashville RR	IAM	BB/URRWA.	SMWIA	IBEW	BRCA	IBFO	BRS		BRT	HRE.
Maine Central RR	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS		(2)	(2).
Midland Valley RR	IAM	BB	SMWIA	IBEW	BRCA	IBFO	IBEW		(2)	(2).
Mississippi Central RR	IAM	BB	SMWIA	IBEW	BRCA	IBFO	(2)		(2)	(2).
Missouri-Kansas-Texas RR	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	BRT	HRE.
Missouri-Kansas-Texas RR. of Texas	(1)	(1)	(1)	(1)	(1)	(1)	(1)		(1)	(1).
Missouri Pacific RR	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	BRT	HRE.
Monon RR	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	BRT	HRE.
Monongahela Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS		(2)	(2).
Montour RR	IAM	BB	SMWIA	IBEW	BRCA	IBFO	(2)		(2)	(2).
Nevada Northern Ry	X	SA	SA	(2)	MMS	SA	(2)		(2)	(2).
New York Central RR	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	ARSA	HRE.
Ohio Central Lines	(1)	(1)	(1)	(1)	(1)	(1)	BRS	ARSA	ARSA	(1).
Cleveland, Cincinnati, Chicago & St. Louis Ry.	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	ARSA	(1).
Michigan Central RR	(1)	(1)	(1)	(1)	(1)	IBFO	BRS	ARSA	ARSA	(1).
Boston & Albany RR	(1)	(1)	(1)	(1)	(1)	IBFO	BRS	ARSA	ARSA	(1).
New York, Chicago & St. Louis RR	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	(2)	HRE.
New York, New Haven & Hartford	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	BRT	HRE.
New York, Susquehanna & Western RR	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS		(2)	(2).
Norfolk & Western Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS		BRT	HRE.
Norfolk Southern Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS		(2)	(2).
Northern Pacific Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	(1)	BRT	ORCB-HRE.
Northwestern Pacific RR	IAM	BB	SMWIA	IBEW	BRCA	IBFO	(1)	ARSA	(2)	(2)
Pennsylvania RR	IAM	URRWA/BB.	SMWAI	URRWA	URRWA	URRWA	BRS	SA	BRT	DC&RR FWU.

See footnotes at end of table.

TABLE 10.—*Employee representation on selected rail carriers as of June 30, 1965*—Continued

Railroad	Machinists	Boiler-makers, black-smiths	Sheet metal workers	Electrical workers	Carmen, coach cleaners	Power house employees, shop laborers	Signalmen	Mechanical foremen, supervisors	Dining-car stewards	Dining-car cooks and waiters
Pennsylvania Reading Seashore Ln	IAM	(3)	SMWIA	IBEW	BRCA	IBFO	BRS		(3)	(3)
Pittsburgh & Lake Erie RR	IAM	BB	SMWIA	IBEW	URRWA	IBFO	UMW	ARSA	(3)	(3).
Pittsburgh & Shawmut RR	URRWA	URRWA	(3)	URRWA	URRWA	URRWA	(3)		(3)	(3).
Pittsburgh & West Virginia Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS		(3)	(3).
Reading Co	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS		(3)	(3).
Richmond, Fredericksburg & Potomac RR	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	RED	BRT	HRE.
St. Louis-San Francisco Ry	IAM	BB/IBEW.	SMWIA	IBEW	BRCA	IBFO	BRS	(1)	BRT	HRE.
St. Louis Southwestern Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS		(3)	(1).
San Diego & Arizona Eastern Ry	IAM	BB	SMWIA	IBEW	BRCA	(3)	(3)		BRT	HRE.
Seaboard Air Line RR	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	BRT	HRE.
Soo Line RR. Co	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	(3)	HRE.
Southern Pacific Co. (Pacific Lines)	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	L.U	BRT	HRE.
Southern Pacific Co. (Texas and Louisiana Lines)	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	BRT	HRE.
Southern Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	BRT	UTSE.
Georgia, Southern & Florida	(1)	(1)	(1)	(1)	(1)	(1)	(1)	ARSA	(3)	(3).
Cincinnati, New Orleans & Texas Pacific Ry	(1)	(1)	(1)	(1)	(1)	(1)	(1)	ARSA	(3)	(3).
New Orleans & Northeastern RR	(1)	(1)	(1)	(1)	(1)	(1)	(1)	ASRA	(3)	(3).
Alabama Great Southern Ry	(1)	(1)	(1)	(1)	(1)	(1)	(1)	ARSA	(3)	(3).
Spokane International RR	IAM	BB	(3)	(3)	BRCA	IBFO	(3)		(3)	(3).
Spokane Portland & Seattle Ry	SA	SA	SA	SA	SA	IBFO	BRS	(1)	BRT	HRE.
Staten Island Rapid Transit Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS		(3)	(3).
Tennessee Central Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	(3)	RED	(3)	(3).
Texas & Pacific Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	(1)	BRT	HRE.
Texas Mexican Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	(3)		(3)	(3).
Toledo, Peoria & Western RR	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS		(3)	(3).
Union Pacific RR	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	L.U	BRT	HRE.
Utah Ry	SA	SA	(3)	SA	SA	(3)	(3)		(3)	(3).
Wabash RR	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS		BRT	HRE.
Western Maryland Ry	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS		(3)	(3).
Western Pacific RR	IAM	BB	SMWIA	IBEW	BRCA	IBFO	BRS	ARSA	BRT	HRE.

[1] Included in System Agreement.
[2] Employees in this craft or class but not covered by agreement.
[3] Carriers report no employees in this craft or class.
[4] Employees represented by W. W. Jordan, an individual.

APPENDIX C

Excerpts from Constitution and General Rules of the Brotherhood of Railroad Trainmen

Effective January 1, 1965

Constitution

Name.

Sec. 1. This organization shall be known as the "Brotherhood of Railroad Trainmen" and shall consist of one Grand Lodge and subordinate lodges.

Officers and Members of the Grand Lodge.

Sec. 2 (a). The Grand Lodge shall consist of a President; and Assistant to the President; fifteen Vice Presidents; eight Alternate Vice Presidents; a General Secretary and Treasurer; an Assistant General Secretary and Treasurer; a National Legislative Representative; an Alternate National Legislative Representative; a Canadian Legislative Representative; an Alternate Canadian Legislative Representative; a Board of Directors consisting of the President, Assistant to the President, four Senior United States Vice Presidents, Senior Canadian Vice President, General Secretary and Treasurer, National Legislative Representative, Canadian Legislative Representative and Chairman of the Board of Trustees and Insurance; an Individual Reserve Board consisting of the President, Assistant to the President and General Secretary and Treasurer; a Board of Trustees and Insurance consisting of three members, one of whom shall be a Canadian; an Alternate to the Board of Trustees and Insurance; an Executive Board consisting of five members, one of whom shall be a Canadian; an Alternate to the Executive Board; a Board of Appeals consisting of seven members; four Alternates to the Board of Appeals, one of whom will be selected from each of the territories, Eastern, Western, Southern and Canadian; and one delegate from each subordinate lodge

who must be a member of the Brotherhood of Railroad Trainmen Insurance Department and must have been so continuously for at least one year.

(b). [Omitted]

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Jurisdiction and Authority.

Sec. 6. The Grand Lodge has exclusive jurisdiction over all subjects pertaining to the Brotherhood. Its enactments and decisions upon all questions are the supreme law of the Brotherhood, consistent with Federal, State and Provincial laws.

• • • •

Duties of the President.

Sec. 9. The President shall devote his whole time to the interests of the Brotherhood. He shall preside at all conventions of the Grand Lodge and shall perform its executive duties when it is not in session. He shall exercise general supervision over the affairs of the Brotherhood. He may call a special convention of the Grand Lodge at any time, and shall do so upon request of a majority of the lodges as provided in Section 24.

He shall adjust all grievances referred to him, interpret all laws of the Brotherhood, and decide all controversies and appeals referred to him by subordinate lodges or members; in all things acting in conformity with this constitution.

He shall be jointly responsible, with the General Secretary and Treasurer, for the disbursement of all funds of the Brotherhood. He shall be bonded in the sum of $500,000, subject to the approval of the Board of Trustees and Insurance, and payable to the Brotherhood and/or the Insurance Department.

He shall organize all subordinate lodges and may call lodge meetings and preside at them.

He shall not suspend or remove any subordinate lodge officer or committee or board member unless they have been charged with a violation of the constitution or of their obligation, and have had a fair trial in their own lodge.

Duties of Assistant to the President.

Sec. 10. The Assistant to the President shall devote his whole time to the interests of the Brotherhood. He shall assist the President in his duties as presiding officer at conventions of the Grand Lodge and shall perform such other duties as may be assigned by the President.

In case of the death, resignation, or removal of the President, the Assistant to the President shall then become President.

Duties of the Vice Presidents.

Sec. 11. Vice Presidents shall devote their whole time to the interests of the Brotherhood and shall perform such duties as may be assigned to them by the President. They shall submit annually a detailed report of their activities.

* * * *

Name.

Sec. 75. A subordinate lodge shall consist of at least ten dues paying members and shall be known as——Lodge. No. —— of the Brotherhood of Railroad Trainmen, holding a charter granted by the President of the Brotherhood. The charter of a lodge cannot be voluntarily surrendered as long as ten dues paying members in good standing object thereto.

* * * *

Jurisdiction and Authority.

Sec. 79. The jurisdiction of the lodge shall be that assigned to it by the President of the Brotherhood. It shall have jurisdiction over all members of the Brotherhood residing within its limits or employed on the system which it represents. Its decisions on all matters within the authority of subordinate lodges shall be final unless appealed to and reversed by the President of the Brotherhood. It may punish members for misconduct and viola-

tion of obligation, and may summon witnesses and provide penalties for their non-attendance.

* * * * * *

Elective Officers.

Sec. 81. The elective officers shall be: a president, a vice president, a secretary and a treasurer. A lodge having a membership of fifty or more members, may create the office of collector, after applying to the President of the Brotherhood and receiving a dispensation to this effect. Upon application, the President may issue dispensations to subordinate lodges permitting them to combine the offices of secretary and treasurer. No member may fill two elective offices at the same time, with this exception, but this shall not prevent his serving as Delegate, legislative representative, or on committees. The most recent former president of a lodge shall have the title of past president.

Appointive Officers.

Sec. 82. The appointive officers shall consist of a conductor, chaplain, warden, inner and outer guard, who shall be appointed by the president-elect previous to his installation. The appointive officers shall be installed with the elective officers.

* * * * *

Duties of the Grievance Committee.

Sec. 101. The local grievance committee shall adjust all grievances that may be referred to it by the lodge, under provisions of General Rule No. 5. The local chairman shall investigate and adjust all schedule rule violations brought to his attention, and where time has not been claimed for schedule violation, the local chairman may make time claims for such violations of schedule, reporting his action at the next lodge meeting. Local chairmen shall not be required to handle grievances arising as a result of minor personal injuries beyond the time lost and expenses incurred.

* * * * *

General Rules

Local Grievance Committees.

No. 1 (a). All subordinate lodges shall elect local grievance committees for each division or system represented in the lodge by five or more members. The committee shall consist of a chairman, who has attended at least three meetings each year during the three years preceding the year of election, and three meetings in the year in which the election is held; a vice chairman and secretary, to be elected from among and by the members in actual service on the division or system which the committee is to represent.

When nominations and elections are held at one meeting, they shall be held separately and the nomination and election of chairman shall be first, then the vice chairman and the secretary. When nominations are held at a meeting prior to the election meeting, the nominations shall be held separately and in the same order. When the referendum is in effect, nominations at the meeting designated for that purpose shall be in the same order and the nominees shall appear on the ballot in that order.

No member who holds an official or semi-official position, temporary or permanent, or who is a member of another railroad labor organization as defined in Section 85 shall be eligible to serve on a grievance committee. Where the Brotherhood has a contract for yardmasters, and a yardmaster or assistant yardmaster is elected to a committee, he shall represent yardmasters and assistant yardmasters only.

The lodge secretary shall notify the General Secretary and Treasurer of the election of grievance committeemen. Upon application to the President of the Brotherhood, under lodge seal, a dispensation may be issued to add one or more members to the local committee, or to create additional local committees, whose duties and authority shall be clearly defined in the dispensation.

A lodge may pay its local chairman a specified salary, which shall be drawn from a fund collected from members in the service he represents.

A local grievance committeeman who is discharged or suspended from the service of a carrier, and who is otherwise eligible, will continue in his office as long as desired by the membership under the jurisdiction of the committee.

The lodge may approve and order paid any legitimate bill for service rendered or time lost by the local committeeman, when the bill is approved in writing by the local chairman and at least four members under the jurisdiction of the committee, and presented at a regular meeting.

Yardmasters obtaining leaves of absence from such positions may serve on local committees. All committees should endeavor to provide in contracts for a leave of absence rule for yardmasters serving on committees, in order to protect their promotional rights.

General Grievance Committees.

No. 2 (a). Every line or system shall have a General Grievance Committee, to be formed in January following the quadrennial election of local grievance committees. The General Grievance Committee shall consist of the chairmen of local grievance committees. Chairmen employed as yardmasters and representing yardmasters only may be members of the General Committee when that committee and the President of the Brotherhood approve.

The date and place of organization shall be fixed by the retiring chairman of the General Grievance Committee. In the event of his failure to fix the date for convening, the date and place of meeting shall be fixed by the President of the Brotherhood, upon application of one or more lodges on the system.

If fewer than 3 lodges are located on a line, the chairman and secretary of each local committee shall, when necessary, assume the authority and perform the duties of a General Grievance Committee.

If a lodge petitions the chairman and secretary of the General Grievance Committee, those officers shall, within ten days, submit the request to convene the General Grievance Committee to all lodges under its jurisdiction, the lodge making the petition furnishing a copy to all lodges.

Lodges shall approve or disapprove the petition within 30 days. If a majority of the lodges concur in the request, the chairman and secretary shall convene the General Committee within 30 days. If one-fourth of the lodges so request, the General Committee shall be convened at least once every 2 years.

When a local grievance committee chairman is unable to attend a meeting of the General Committee, or if the local chairman is the General Chairman, the vacancy shall be filled by the vice chairman of the local committee, but he shall not be eligible for election as an officer of the General Committee, except the chairmanship as provided in General Rule 2 (b).

Each chairman of a local grievance committee shall have a credential, signed by the president and secretary of his lodge and with the lodge seal, which shall be his authority to be seated as a member of the General Grievance Committee; however, the General Grievance Committee is the judge of the qualifications of a member to sit on the committee.

(b). The officers of a General Grievance Committee shall be elected on the final day of the quadrennial formation, except the chairman who may have already been elected by referendum, and shall consist of a chairman, vice chairman and secretary, whose term of office shall be four years, or until their successors have qualified.

To be eligible for election as chairman of a General Grievance Committee, a member shall have served at least four years as chairman of a local grievance committee. No member shall be eligible to be elected as an officer of a General Grievance Committee who has reached the age of sixty-five or during the calendar year in which he attains such age. Retirement shall be compulsory for all General Grievance Committee officers on the last day of the calendar year in which they attain age sixty-five.

A General Grievance Committee may elect as its chairman a brother who is not a member of the committee; provided that he holds seniority in service under the jurisdiction of the Committee, and is otherwise eligible. A chairman thus elected shall have all the authority given to chairmen

of General Grievance Committees under the General Rules, except that in sessions of the Committee he shall not vote, although he may speak. Otherwise, he shall have and assume all rights and powers vested in the chairman of a general grievance committee under the General Rules.

If a vacancy occurs in the office of chairman, it shall be filled by the vice chairman until the election of another chairman is held, in accordance with the election rules of that system. The secretary shall immediately notify the President of the Brotherhood of a vacancy in the office of chairman. The President shall call an election within 30 days of such notice. If a vacancy occurs in the office of vice chairman or secretary, the General Grievance Committee shall fill such vacancy. Elections to fill vacancies shall be by majority vote of the local chairmen and shall be by secret referendum after at least 15 days notice by mail, at the last known home address (mail notice not required in Canada), or in General Committee session. When referendum elections are provided for general chairmen, elections to fill a vacancy in that office shall conform to General Rule 2 (e).

When election is held by referendum, each candidate shall have ten days to accept or decline nomination before the ballot is printed.

The general chairman, with the approval of the General Committee, and the President of the Brotherhood, may select assistants for General Committee offices. A member of the Committee who fails to attend a meeting, after notification, shall, unless excused, be expelled from the Brotherhood after not less than 15 days written notice of specific charges, fair hearing, and conviction.

A general chairman who is discharged or suspended from service of a carrier shall continue in his office and is eligible to hold office as long as desired by the membership under jurisdiction of the General Committee. A General Committee requiring the full-time services of the vice chairman and/or secretary may re-elect these officers, providing they hold seniority in service, without their being re-elected as local chairmen. When so re-elected, these officers may speak but shall have no vote in the General Committee.

The President may grant dispensation for the establish-

ment and maintenance of separate General Grievance Committees for road and yard on railroads in Canada represented by the Brotherhood. Each class of service represented by a separate General Grievance Committee shall, by assessment, maintain themselves and shall determine whether separate salaried general chairmen will be maintained in accordance with this General Rule.

[Paragraphs (c) through (f) of General Rule No. 2, relating to referenda, omitted.]

Duties of General Grievance Committee.

No. 3. Each General Grievance Committee shall investigate all matters lawfully before it. It may amend any part or all of any complaint or claim submitted to the committee. There shall be a limitation of two years in connection with the handling of any cases of uncontested seniority (applicable only to cases involving position and seniority rank on seniority rosters). No case for reinstatement shall be accepted for handling by local lodge or local or general committees, after the expiration of two years from date of dismissal, except where otherwise provided by schedule rules.

After the Committee has decided on the justness of any claim or complaint, it shall make an effort to adjust the same with the general officers of the carrier in accordance with General Rule No. 10. General chairmen shall handle with the carrier, any claim or grievance that has been appealed to the General Committee; provided a limitation agreement exists on the property and the general chairman shall try to reach agreement with the management to extend the time limit. A General Grievance Committee or its subcommittee, or an officer representing the Grand Lodge assisting a General Committee, shall not negotiate an agreement with a carrier involving the changing of recognized home and other terminals in either pool or assigned freight or passenger service, or the reassignment of crews in connection therewith, without first holding a referendum for all members who hold seniority rights and are paying general grievance committee assessments, on each seniority

district, division or subdivision affected, with a majority vote to decide the issue. The referendum shall proceed as provided in this Rule and in Section 85 (b).

Nothing contained in this rule shall, in any way, change standard rules which were made a part of the working agreements on the various railroads prior to the enactment of this Rule by the twenty-ninth convention. A General Grievance Committee or an officer representing the Grand Lodge assisting a General Committee shall not revise or change a general or system wage schedule or agreement, unless authorized to do so by a majority vote of the lodges on the system or by a majority of votes in a referendum of the members on the system who hold seniority rights in the class or grade of service affected, such referendum to be conducted in the following manner.

The secretary of the General Grievance Committee shall prepare a ballot which shall set forth the proposed changes and shall provide a blank space after each proposition, in which the member shall record his vote. The ballot shall also provide a place for the signature and address of the member and shall specify the date by which the ballot must be returned to the lodge secretary. The secretary of the General Grievance Committee shall furnish sufficient ballots and stamped envelopes to the lodge secretary to provide for each member entitled to vote. Each member shall make a mark, in the space provided, indicating his wishes, write (not print) his signature and address in the space provided on the ballot and mail to the designated post office box. The member's signature shall be checked against the register of the lodge at the time ballots are canvassed. The provisions of Section 85 (b) relative to obtaining the post office box shall be followed.

The lodge secretary shall report the result to the secretary of the General Grievance Committee and to the other lodges affected. The secretary of the General Committee shall prepare a recapitulation of the results of the voting and furnish this to the President of the Brotherhood with copies to each of the affected lodges.

The Committee may, when authorized to do so, make and enter into contracts of agreement, consistent with the law and policy of the Brotherhood, with the railroad or bus

line whose employes it represents, concerning rates of pay and working conditions; provided, however, that a standard rule shall not be amended without the permission of the President. Yard work and road work are two separate and distinct classes of service and the President, General Committees and officers assigned to assist General Committees shall maintain a line of demarcation between yard and road service so that employes of one class of service shall not encroach upon the rights of employes of the other class of service. This provision shall be mandatory only where the Brotherhood holds the contract for yard and road service. If a condition occurs where, in the judgment of the General Committee, the line of demarcation cannot be determined, the Committee shall prepare a statement of the facts of the controversy, together with its recommendation and furnish this to the President who shall advise the General Committee of his decision.

Any officer or member of a General Grievance Committee may be removed for cause by a majority vote of the Committee; provided that notice, in writing, of charges shall be submitted to him at least 30 days before a hearing. If the Committee is not in session, a copy of the charges shall be forwarded to the President of the Brotherhood, who will determine whether the charges warrant convening the General Grievance Committee to try the accused.

Should the President of the Brotherhood desire to prefer charges against any officer or member of a General Grievance Committee, the charges shall be made in writing and be served upon the accused at least 30 days prior to the date set for the trial. The trial shall be held in the city where the General Committee maintains its headquarters or where the accused resides. The accused may be represented at the trial by counsel, who shall be a member of the Brotherhood.

Duties of Chairman and Secretary of General Grievance Committee.

No. 4. The chairman of a general grievance committee shall be its executive head, and see that the laws and rules of the Brotherhood are observed. When it will not interfere with his other duties, he shall organize lodges and audit

the accounts of lodges and perform other work as directed by the President of the Brotherhood, his expenses being paid by the Brotherhood. On systems having a salaried chairman, such salary and expenses shall be credited to the system on which the work is performed. In his absence, or inability to act, the vice chairman shall act as chairman, and if the office of chairman becomes vacant, it shall be filled as provided in General Rule No. 2.

The general chairman shall visit all lodges under his jurisdiction at least once during his term. He shall make a quarterly report, in writing, showing his daily activities, and shall include therein a quarterly report of the receipts and disbursements in the general committee fund for his system, giving itemized statement of disbursements, which shall be furnished him by the General Secretary and Treasurer in sufficient copies for distribution with his report. A copy of these reports shall be sent to each lodge under his jurisdiction and to the President of the Brotherhood.

The general chairman shall make a quarterly report, in writing, showing all claims pending and unsettled at the end of the quarter and all claims settled or disposed of during the quarter. Copies of this report shall be furnished to the President of the Brotherhood and to each lodge and local chairman within the jurisdiction. Copies of special agreements and rulings negotiated by general chairmen and/or general committees shall be furnished each lodge for members affected in the territory under the jurisdiction of the general committee. The chairman shall furnish each member under his jurisdiction who is affected by a national or system agreement, with a copy of that agreement. In the event of failure to make such report, to all lodges and the President, salary checks shall be withheld until the quarterly report has been issued.

The secretary shall keep an accurate record of the proceedings of the committee; issue notices of its meetings; shall have charge of the books and records of the committee; shall furnish to the President of the Brotherhood a copy of all schedules of rules and rates of pay agreed to by the committee and make a report of all grievances disposed of. At the close of each meeting of the general grievance committee, he shall send a copy of the minutes to each lodge

on the system. After the quadrennial election of officers of a general grievance committee, the secretary shall notify the President of the Brotherhood of their names and addresses and shall also notify him of any changes in the officers of the committee during the term of office.

Consideration of Grievances.

No. 5. Any member claiming a grievance shall make a statement of the grievance, in writing, containing all of the material facts necessary for a clear understanding of the grievance, and present or mail it to the lodge secretary for consideration at the next regular meeting. The lodge shall then determine, by majority vote of the members present, employes of the division, who hold seniority rights in the class or grade of service involved, whether to sustain the grievance.

If the grievance is sustained, the lodge shall then authorize either the local chairman or the local grievance committee to bring the matter before the trainmaster, superintendent, or other proper person, and use every means to effect a satisfactory settlement, and to report action and all things pertaining to the case to the lodge. If the result is not satisfactory, it may be referred to the general grievance committee for further action. A member or a lodge may withdraw a grievance placed before a general grievance committee, provided such action is taken before the grievance has been presented by the general grievance committee to the officer of the company, but not thereafter.

All grievances must be handled by the regular local grievance committee, or by the local chairman, if the lodge so directs, before being referred to the general grievance committee for adjustment. Grievances pertaining solely to members employed on a particular road or division or bus line, shall be disposed of by a majority vote of the members of the lodge who hold seniority rights in the class or grade of service involved, who are employed on such road, division or bus line; provided, that at least five such members shall be present to take such action. On small systems, where the office of general chairman is maintained, upon the request of all lodges on each system, the President of

the Brotherhood may issue dispensation permitting the general chairman to handle local grievances. Nothing in this rule shall be construed to prohibit a local lodge from submitting directly to state or national legislative boards matters involving violation of state or federal laws.

No grievance shall be considered by a subordinate lodge unless the member presenting the same was a member in good standing on the date the cause of the grievance originated, except that this does not apply where it is clearly demonstrated that violation of schedule rule is involved.

Appeal from Action of Subordinate Lodge on Grievances.

No. 6. A member who believes that an injustice has been done him by action of his lodge on a grievance submitted by himself or another member of the lodge, may appeal to the President of the Brotherhood in accordance with the provisions of Section 139.

* * * *

Failure of Local Committee to Adjust.

No. 8. When the local chairman or grievance committee fails to satisfactorily adjust a grievance referred to it, and if the lodge orders it, the secretary shall immediately send a certified copy of the grievance to the chairman of the general grievance committee. If a time limit is involved, the secretary shall send the certified copy without waiting for the lodge order, and then report his action at the next meeting of the lodge.

Upon receipt of the certified copy of the grievance, the chairman of the general grievance committee shall meet with the secretary of the general grievance committee and, if requested by the lodge concerned, the chairman of the local grievance committee, in the city where the headquarters of the general superintendent or general manager of the carrier for that part of the system on which the grievance exists, is located. Expenses of the local chairman, in such cases, shall be paid by the general grievance committee.

A committee thus constituted may amend, or with the

approval of the President of the Brotherhood, refer to the Legislative Department, any part or all of any complaint or claim submitted to the committee, subject to appeal to the general grievance committee and/or the Board of Appeals. A general grievance committee may authorize its chairman to handle all grievances received from local lodges with the management for settlement. If he fails to obtain settlement, he shall report this to the secretary of the general grievance committee and the chairman of the local lodge where the grievance exists, to determine further procedures.

* * * *

The President and the General Committee.

No. 12. The President, or his representative, upon request, shall meet with the General Chairman and renew all honorable methods to effect an amicable and satisfying adjustment of the grievances. Failing in this, the matter shall be referred to the General Grievance Committee, with a concise statement of the controversy, together with the result of the attempt to adjust it with the managing officers of the carrier. If 2/3 of the members of the Committee vote in favor of withdrawing from the service rather than continuing under the conditions specified by the company, the President and the General Grievance Committee shall have the authority to sanction a strike on the system or part thereof that is affected.

Nothing in this Rule shall prohibit the circulation of a referendum strike ballot. When a referendum strike ballot is circulated, 2/3 of the members voting for withdrawal from the service shall be required.

Notwithstanding any other provision of these Rules, the President of the Brotherhood may, at any time that he considers a situation warrants such action, and with the concurrence of two-thirds of the members of the General Grievance Committee, authorize a peaceful withdrawal from service.

In the event of a strike, the President of the Brotherhood shall be the recognized leader, and, in conjunction with the General Secretary and Treasurer, and after having re-

ceived the approval of the Board of Trustees and Insurance, shall have authority to appropriate from the Protective Fund such money for legal advice and incidental expenses as may be required for a successful prosecution of the strike.

The President and General Grievance Committee may terminate a strike, or discontinue any or all strike benefits, but in the event of a difference of opinion as to the termination of a strike, or the discontinuance of benefits, and upon application of either party, the Board of Trustees and Insurance, meeting jointly or separately with the parties, shall decide the question. A decision so reached shall be final; however, nothing in this Rule shall prohibit the submission to the membership of the question of terminating the strike.

When a Vice President or Deputy President is assigned to any property to handle a docket of unsettled cases, and when he is prepared to close out certain cases, the local chairman from the lodge in which such cases originate shall be permitted to be present for discussion of such cases with the Vice President or Deputy President, providing his lodge approves.

When cases that a Grand Lodge officer is preparing to close out involve an interpretation of a standard rule or a matter affecting two or more divisions, or any infringement on the rights of members in yard service against road service, or vice versa, such cases must not be closed out without the approval of the local chairman or chairmen involved.

A Vice President or any Grand Lodge officer shall not close out a dispute when it is indicated that an appeal is being made within the Brotherhood.

Appeals from General Grievance Committee Decisions.

No. 13. Whenever action is taken by the General Grievance Committee of any system shall be law to the lodges on that road or bus line unless reversed by the Board of Appeals. Prompt notice of, and appeal to the Board of Appeals by any affected member or lodge from action of the General Grievance Committee, shall be a stay of action in

the matter pending final determination by the Board of Appeals.

If a member refuses to abide by the action of a General Grievance Committee, he shall be expelled from the Brotherhood for violation of obligation, after not less than 15 days written notice of specific charges, hearing and conviction as provided in this constitution.

Any member who believes an injustice has been done him by the action of a subcommittee may appeal to the General Grievance Committee, or to the Board of Appeals, as he may elect, within one year from the date of the decision. If he decides to appeal to the General Grievance Committee and then is not satisfied with the decision, he may appeal to the Board of Appeals within 90 days after date of decision. In case the General Grievance Committee has not had a meeting at which action has been taken on an appeal, and such appeal is pending, by the Committee, the appellant or lodge from which the grievance emanated may request the General Grievance Committee to refer the same to the Board of Appeals at least 30 days before the convening of the Board. The secretary of the Committee shall comply with the request.

The appellant shall provide the opposing party a copy of his appeal, and the appellee shall provide the appellant a copy of his answer. This shall apply to original appeal and answer and all subsequent correspondence connected with the case.

When an appeal to the Board of Appeals results from a dispute between two lodges or seniority districts, one representative from each lodge or seniority district involved shall be privileged to appear before said Board at regular Committee pay and expense if the General Chairman appears before the Board.

Grievance—Members Authorization.

No. 14. Except in individual cases, where the member involved serves reasonable written notice to the Brotherhood to the contrary, each member of the Brotherhood grants complete authority to the Brotherhood and any of its constituted representatives to act for him and in his

name for the purpose of disposing, in any manner, of any and all of his claims, complaints or grievances against his railroad or motor carrier employers. Each member authorizes the Brotherhood and its representatives to submit such claims, complaints or grievances for determination to any person, board or other tribunal provided by law or otherwise, which to the Brotherhood or its representatives may be necessary or advisable. The Brotherhood and its representatives shall have complete authority to receive notice of hearings, or to waive hearing, and to appear for, represent and act for its members before such person, board or other tribunal in connection with consideration and determination of claims, complaints or grievances; provided, however, that any adverse action by the Brotherhood or its representatives or any such claim, complaint or grievance shall be subject to appeal in accordance with the provisions of this constitution.

Inciting Strikes—Penalty.

No. 15. Any member inciting a strike, or participating therein, by whatsoever name such a strike may be designated, excepting as provided in General Rule 12, shall, upon conviction thereof, be expelled and shall forfeit all his rights as a member of the Brotherhood.

[Procedural provisions in General Rule No. 15 omitted.]

* * * *

Protective and Strike Funds.

No. 18. The Brotherhood shall maintain a fund, to be known as the Protective and Strike Funds of the Brotherhood of Railroad Trainmen. Its purpose shall be to protect the interests of its members and to defray the expenses of conducting a strike authorized by the proper authority of the Brotherhood, and to pay the expenses of conducting membership campaigns and protecting the interests of the Brotherhood against detrimental propaganda.

Protective and Strike Funds—Amounts—How Collected.

No. 9. For the maintenance of the Protective Fund each member of the Brotherhood, except non-beneficiary and non-insurance members, and non-beneficiary members who transfer to the sub-standard plan, and/or members who have reached the age of 60, none of which are engaged in yard, train or bus service, or service of the Brotherhood, or members who have been retired on account of receiving a retirement annuity or total and permanent disability by their companies, or members who no longer hold seniority in train, yard or bus service, shall pay twelve dollars a year, in twelve installments.

For the maintenance of the Strike Fund each member who is liable for Protective Fund assessments shall pay three dollars a year, payable in twelve installments, and such assessments shall be used exclusively for strike purposes.

These assessments shall be paid to the treasurer, under the same conditions and penalties prescribed by this constitution for non-payment of monthly dues. On or before the fifteenth day of the month for which assessments are collected, the treasurer shall remit the money collected for the Protective and Strike Funds to the General Secretary and Treasurer, on the form provided for that purpose, observing the rules governing the remittance of assessments.

Protective and Strike Funds—Limits—Penalties.

No. 20. The General Secretary and Treasurer shall keep a record of all receipts from subordinate lodges for this purpose, and make a monthly report of the amount received from each subordinate lodge to all subordinate lodges. When either of these funds reaches five million dollars ($5,000,000), the assessments on that particular fund shall be discontinued until such time as such fund falls below said amount, at which time the assessments for that fund will automatically resume. Any lodge failing to make its returns, shall be subject to the same penalties which attach to non-payment of assessments.

Special Assessments for Protective and Strike Funds.

No. 21. In case of an emergency, if the Protective and Strike Funds are insufficient, the President and General Secretary and Treasurer, in conjunction with the Board of Trustees and Insurance, may levy such additional assessments and in such amounts as are required for the protection of the members; provided that such assessments shall not exceed two dollars a member in any one month. The officers named in this Rule shall be considered a governing body for this purpose and such additional assessments shall be valid until the next regular convention.

Payment from Protective and Strike Funds.

No. 22. When a strike has been inaugurated in accordance with the Rules of the Brotherhood, the president, treasurer, and secretary of all lodges having jurisdiction on the system where the strike is in effect, shall forward to the General Secretary and Treasurer, within ten days after the date that the strike is inaugurated, a sworn statement showing the names, occupations and length of service with the company, of all men under the jurisdiction of the lodge engaged in the strike, including striking members who are working under the jurisdiction of another contracting organization. Striking members working under the jurisdiction of another contracting organization shall be paid the same strike benefits paid to men under jurisdiction of the lodge engaged in the strike.

Members of the Brotherhood who are unemployed due to any recognized union representing employes in the various classes or crafts of railroad employment, being on legal strike, or members not covered by the Railroad Unemployment Insurance Act and paying into the Protective and Strike Funds who are unemployed due to any recognized union being on strike, shall be allowed strike benefits for a period not to exceed 60 days, as though they were active participants in the strike, except that the 60 days limit may be extended in unusual circumstances determined by the President, General Secretary and Treasurer, and the Board of Trustees and Insurance.

Amount of Benefits—When Payable.

No. 23. Striking members shall be paid $100 a month, plus $15.00 for each additional dependent; provided that $145.00 a month shall be the maximum amount payable to any one member, payable semi-monthly during the continuance of the strike. After unemployment benefits have expired, if the strike benefit is payable under the constitution, the benefits shall be increased by $25.00 a month, plus $5.00 for each dependent; provided that $175.00 a month shall be the maximum amount payable to any one member.

On the 15th and last days of the month strike pay rolls shall be prepared by the president, secretary and treasurer of each lodge involved, showing the names of members, and non-members, if any, entitled to benefits by their withdrawal from service at the outset of the strike and fully participated in the strike. This to include members cut off by reduction in force, and not employed in gainful occupation. Members holding regular assignments in conductor service shall be paid the same as other members. The pay roll shall be typewritten or written in ink, listing members at the top in alphabetical order and non-members, if any, at the bottom in like order, and shall show opposite the names listed, the number of days benefits to which each is entitled and the amounts due them. The lodge seal shall be affixed to all strike pay rolls.

The General Secretary and Treasurer, when he receives the pay rolls, by direction of the President, shall draw from the Strike and/or Protective Funds the amount due and pay the same by check, through the treasurers of the several lodges. On receipt of the pay rolls and amounts due thereon, from the General Secretary and Treasurer, the lodge treasurer shall forthwith deliver the checks to the parties, secure their signatures to the pay rolls and return the receipted pay rolls to the General Secretary and Treasurer. Each treasurer shall keep an accurate account of all money received by him.

In the event of a general strike, caused by a concerted or general wage movement, the President and General Secretary and Treasurer, in conjunction with the Vice Presidents

in charge of the strike and the Board of Trustees and Insurance, may determine the suspension of payments of any or of all strike benefits under this Rule, if such action is necessary for the protection of Brotherhood funds.

FILED
MAR 15 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 794

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF RAILROAD TRAINMEN and R. E. CARROLL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

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IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The Findings of Fact and Conclusions of Law and the Order of Judgment of the District Court, which were not officially reported, appear at pp. 57-62 of the record. The opinion of the Court of Appeals is reported at 367 F.2d 137, and is also reproduced in the record at pp. 149-152.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on September 21, 1966. The petition of the Denver And Rio Grande Western Railroad Company

for rehearing was filed on October 7, 1966, and was denied on October 24, 1966. Certiorari was granted by this Court on January 9, 1967. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The statutory provisions involved are § 1391 of Title 28, United States Code and Rule 52(a) of the Federal Rules of Civil Procedure. They are fully set forth in Appendix A hereto. The provisions of the Judicial Code primarily involved in the decisions below are as follows:

> "Sec. 1391. Venue generally.
>
> • • •
>
> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.
>
> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

QUESTIONS PRESENTED

1. In an action to recover damages for an unlawful strike, is venue proper as to the defendant labor union, an unincorporated association, in the judicial district in which the strike occurred and in which the defendant labor union represents the employees involved and conducts its representational activities on their behalf; or can the action be brought only in another judicial district, some thirteen hundred miles away, merely because the defendant labor union maintains its principal office in the latter judicial district?

2. Was the decision of this Court in *Steelworkers* v. *Bouligny*, 382 U.S. 145 (1965), on a question of diversity jurisdiction intended, as the Court below concluded, implicitly to overrule the Second Circuit's decision in *Rutland Railway Corporation* v. *Brotherhood of Locomotive Engineers*, 307 F.2d 21 (2d Cir. 1962), cert. denied, 372 U.S. 954, and other federal decisions holding that an unincorporated association is a resident for venue purposes of the judicial districts in which it is doing business?

3. Was it consistent or permissible for the court below, having purportedly ruled on the basis of *Steelworkers* v. *Bouligny*, 382 U.S. 145 (1965), to conclude that venue can and must be laid at the unincorporated association's principal place of business, i.e., Cleveland, Ohio?

4. Where all of the evidence shows the General Chairman of a defendant labor union participated in the authorization, institution and conduct of an unlawful strike, may the Court of Appeals set aside the judgment of the District Court holding the General Chairman responsible, along with the union, for the damages accruing from such a strike?

STATEMENT

This action was brought by the Denver and Rio Grande Western Railroad Company against the Brotherhood of Railroad Trainmen, certain officers of the Brotherhood and members of the Brotherhood employed by the Rio Grande (R. 7). The suit sought to recover damages resulting from a strike by the Brotherhood against the Rio Grande in violation of the provisions of the Railway Labor Act (45 U.S.C.A. § 151 et seq). The Rio Grande is a corporation organized under the laws of the State of Delaware. It owns and operates a railroad system extending from Denver, Colorado Springs and Pueblo, Colorado, to Salt Lake City

and Ogden, Utah, with numerous branches on those lines. Its principal place of business is in Denver, Colorado, and 63 per cent of its line of road is situated in Colorado (R. 46, 52).

The Brotherhood of Railroad Trainmen, an unincorporated association which holds representation rights on most of the railroads in the United States,[1] consists of a Grand Lodge with headquarters at Cleveland, Ohio, and subordinate lodges located on the lines of such railroads (R. 8, 46). The Brotherhood is the designated representative of trainmen employed by the Rio Grande, the vast majority of whom work and reside in Colorado. As provided in the Brotherhood's Constitution and General Rules, the local lodges on each railroad elect a General Grievance Committee and a General Chairman thereof for the purpose of performing the Brotherhood's representation functions under the Railway Labor Act (R. 5-6).[2] On the Rio Grande, respondent R. E. Carroll was the General Chairman at the

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[1] The Thirty-first Annual Report of the National Mediation Board, for the fiscal year ended June 30, 1965, shows that the Brotherhood represents one or more classes or crafts of railroad employees on 91 railroads. This data is limited to "selected rail carriers" and thus does not reflect fully the extent of the Brotherhood's representation rights. (Thirty-First Annual Report of National Mediation Board for the fiscal year ended June 30, 1965, pp. 78-86.)

[2] Some of the relevant provisions of the Constitution and General Rules of the Brotherhood appear in the record (R. 5-6). For the purpose of presenting the complete structure which the Brotherhood utilizes in the representation of railroad employees, additional provisions of the Constitution and General Rules of the Brotherhood are reproduced in Appendix B hereto. As required by § 201(a) of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. § 431) the Constitution and General Rules of the Brotherhood are on file with the United States Department of Labor.

time of the strike involved in this litigation and at the time of the proceedings in the lower courts. Respondent Carroll maintains his headquarters at Denver, Colorado (R. 5-7, 11, 46-47, 73).

In accordance with the authority vested in him by the provisions of the Constitution and General Rules of the Brotherhood of Railroad Trainmen, General Chairman Carroll submitted certain claims to the First Division of the National Railroad Adjustment Board on behalf of employees of the Rio Grande, based on alleged violations of the collective bargaining agreement between the Rio Grande and the Brotherhood (R. 58). Subsequently, the National Railroad Adjustment Board issued awards 19372 and 19389 sustaining the claims (R. 58). The Board awarded a full day's pay to each claimant for each occasion on which it found a violation of the agreement, despite the fact that the claimants had suffered no monetary loss. Convinced that the payments called for by the awards were arbitrary and unreasonable, the Rio Grande declined to make the payments required by the awards.[1] In such circumstances, an enforcement action involving a review of the validity of the awards is authorized by Section 3, First(p) of the Railway Labor Act. The Brotherhood, however, chose to attempt to compel the Rio Grande to comply with the awards by calling a strike (R. 59).

On May 16, 1960, representatives of the Brotherhood advised the Rio Grande that the Brotherhood would call a

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[1] In an enforcement action instituted after the strike in question was found to be unlawful, it was held that nominal damages, rather than a full day's pay, was the proper measure of damages since the employees involved had not suffered any monetary loss as a result of the claimed violations of the agreement. *Brotherhood of Railroad Trainmen* v. *Denver and Rio Grande Western R. Co.*, 338 F. 2d 407 (10th Cir. 1964), cert. denied, 380 U.S. 972.

strike on that day to compel the Rio Grande to make payments under the awards (R. 147). The strike commenced and lasted until some hours after the United States District Court for the District of Colorado issued a temporary restraining order (R. 23, 73-75). The District Court and the Court of Appeals ultimately held the strike to have been in violation of the Railway Labor Act (45 U.S.C. § 151 *et seq.*). See *Denver And Rio Grande Western R. Co.* v. *Brotherhood of Railroad Trainmen,* 185 F. Supp. 369 (D.Colo. 1960), affirmed, 290 F. 2d 266 (10th Cir. 1961), certiorari denied, 366 U.S. 966. This action was subsequently brought in the United States District Court for the District of Colorado to recover damages accruing from diversions of freight to other railroads as a result of the unlawful strike.

Prior to the trial the Brotherhood moved to dismiss the complaint on the ground, among others, that venue was improper (R. 10-11). This motion was denied by the District Court on August 29, 1963 (R. 12). The District Court, concluding that it had jurisdiction of the parties and subject matter under 28 U.S.C. §§ 1331 and 1337, awarded the Rio Grande a judgment of $37,988.37 against the respondents (R. 57-62).

The Brotherhood appealed from the judgment entered by the District Court. The Court of Appeals reversed, ruling that *Steelworkers* v. *Bouligny,* 382 U.S. 145, implicitly constituted "a rejection of the principle espoused by the *Rutland* case," and holding that venue (1) did not properly lie against an unincorporated association where it did business but (2) was proper only at its principal place of business, which was Cleveland, Ohio. The Court of Appeals further held that the record did not show that respondent Carroll, the General Chairman of the Grievance Committee on the Rio Grande, had any responsibility for the illegal strike.

SUMMARY OF ARGUMENT

The determination of the District Court that the Brotherhood of Railroad Trainmen resides in the judicial district of Colorado for venue purposes under 28 U.S.C. § 1391(b) represented an eminently correct and generally accepted construction of the statute. Although Section 1391(b) of Title 28 does not define the requirement of residence with regard to unincorporated associations, the governing authorities at the time of its enactment, the legislative history of the statute, and the decisions of the Courts which have had occasion to consider the question all support the holding of the District Court. When the Judicial Code (Title 28) was revised in 1948, the prevailing and accepted authority held that an unincorporated association, considered to be an entity for venue purposes, was subject to the same venue requirements as those applicable to a corporation. Questions concerning the principles of diversity jurisdiction over such unincorporated associations were carefully and consistently distinguished from federal venue questions. When Congress revised the general venue provisions in 1948, it obviously did so in light of the prevailing judicial authorities with respect to venue requirements for unincorporated associations. Thus the provisions of Section 1391(c), defining residence for corporations as the judicial districts in which they are incorporated or licensed to do business or are doing business were intended to be, as the case law principle was, applicable also to unincorporated associations.

There is absolutely no indication in the legislative history of the revised venue provisions indicating any intent on the part of Congress to depart from the generally established rule that unincorporated associations are subject to the same venue requirements as corporations. Moreover, those most intimately concerned with the 1948 revision

have voiced general approval of the decisions holding, as the District Court held in the present case, that Section 1391(c) defines residence for unincorporated associations as well as corporations. It is also indisputable that these revisions of the Judicial Code were intended to liberalize venue requirements, as this Court has consistently held.

The Congressional purpose to regard unincorporated associations as residents of the judicial districts in which they pursue their business activities is indicated, insofar as labor unions are concerned, by the venue provisions of the Labor-Management Relations Act of 1947, providing that unincorporated labor unions may be sued in any judicial district in which they are engaged in representing or acting for employee members. Since this statute was enacted just prior to the revision of the Judicial Code in 1948, it reasonably reflects the Congressional purpose to make Section 1391(c) applicable to unincorporated labor unions, and the practical desirability of permitting venue to be laid in such districts.

The clear preponderance of the decided cases since 1948 adhere to the construction adopted by the District Court in the present case. These cases, following the basic approach of *Sperry Products* v. *Association of American Railroads,* 132 F. 2d 408 (2d Cir. 1942), have applied to unincorporated associations the same venue requirements as those applicable to corporations under Section 1391(c). The few contrary cases have involved no consideration of the purpose and effect of the 1948 revision of the venue statutes.

The decisions of this Court involving fundamental venue principles, and the record in the present case aptly demonstrate that the judicial district of Colorado was not only a fair but, indeed, the most appropriate forum. The liability upon which the action is based accrued in the judicial dis-

trict of Colorado as a result of the activities which the Brotherhood carried on in that district. Colorado is in fact the focal point for the exercise of the Brotherhood's representational authority with respect to petitioner's empolyees. Although the national entity is the certified representative, residents of Colorado discharge its duties and responsibilities with respect to petitioner's employees. It is only through the signature of respondent Carroll, a Colorado resident, that the Brotherhood is a party to the basic collective bargaining agreement applicable to petitioner's employees. Cleveland, Ohio, where the Brotherhood maintains its principal place of business, and where the Court of Appeals suggested that the action should be brought, simply has no real relationship to the basic activities and the significant facts giving rise to liability in the present case. As this Court has held, venue is primarily a concept of convenience and all of the considerations pertinent to the convenience of the parties point to the judicial district of Colorado as the proper forum.

The decision of this Court in *Steelworkers* v. *Bouligny*, 382 U.S. 145, does not warrant the result reached by the Court of Appeals. *Steelworkers* v. *Bouligny* involved questions relating exclusively to the diversity jurisdiction of federal courts. Accordingly, this Court did not rely on, discuss, or cite any cases dealing with venue or any considerations pertinent to venue problems. Consequently the Court of Appeals clearly erred in deciding that the result which it reached was required by this Court's opinion in *Steelworkers* v. *Bouligny*. The complete reliance of the Court of Appeals on the *Steelworkers* case clearly appears from the absence of any statutory, policy, or precedent analysis to support its holding.

Furthermore, even if *Steelworkers* v. *Bouligny* has any relevance to venue questions, the holding that the Brother-

hood can be sued only at Cleveland, Ohio, is at best not consistent with this Court's *Steelworkers* decision. If unincorporated associations are to be treated as aggregations of individuals for venue as well as diversity of jurisdiction purposes, the residence of the unincorporated Brotherhood would only be the residence of all of its individual members, not the place where it maintains it principal place of business. Since all members of a national union or a widespread unincorporated association will not all be found in any one judicial district, federal venue would never be proper under 1391(b), although Congress certainly intended that there be an effectively available federal forum to enforce rights arising under federal statutes.

The Court of Appeals also erred in deciding that judgment was improperly entered against respondent Carroll. Under the applicable standards of review, and in view of the evidence of record, the judgment entered by the District Court against respondent Carroll was clearly correct and should have been affirmed.

ARGUMENT

I. THE BROTHERHOOD OF RAILROAD TRAINMEN RESIDES FOR VENUE PURPOSES IN THE JUDICIAL DISTRICT OF COLORADO AND THE VENUE REQUIREMENTS OF 28 U.S.C. § 1391 HAVE BEEN SATISFIED.

When it denied the Brotherhood's motion to dismiss for improper venue, the District Court necessarily concluded that an unincorporated labor union resides for venue purposes in a judicial district in which (1) the union conducts its representational activities, (2) virtually all of the represented employees work and live, (3) the employer with whom the union negotiates and confers maintains its principal place of business and (4) the specific activity with

respect to which liability is asserted took place. The District Court found that these detailed circumstances met the residence requirement of § 1391 of the Judicial Code. As discussed below, this interpretation is supported by the legislative history of the statute in question, by the decisions of the federal courts and by the basic venue principles enunciated by this Court.

A. The Circumstances Attending the 1948 Revision of the Judicial Code Support the Holding of the District Court Regarding the Residence of the Brotherhood for Venue Purposes.

Since this is a civil action in which jurisdiction is not founded solely on diversity of citizenship, the venue requirements are stated by paragraph (b) of § 1391, that is, the action may be brought "only in the judicial district where all defendants reside." The venue requirement thus imposed is not defined insofar as unincorporated associations are concerned. In this respect, Congress adhered to the pattern of prior legislation for the statute which was superseded by the 1948 revision was similarly silent. The test which Congress intended the courts to follow, however, may be gathered from the circumstances attending the 1948 revision of the Judicial Code.

Prior to the revision of the Judicial Code in 1948, venue in non-diversity cases was governed by the requirement that "no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant" (28 U.S.C. § 112). In the absence of elaboration, the courts were required to determine whether a particular defendant was or was not an inhabitant of the judicial district in which the action was instituted. With respect to unincorporated associations, the prevailing law and the governing

principles had been enunciated by Judge Learned Hand in *Sperry Products* v. *Association of American Railroads*, 132 F. 2d 408 (2d Cir. 1942), which involved an interpretation of the venue provisions applicable to patent infringement actions. In *Sperry Products*, the relevant statute (28 U.S.C. § 109 (1940)) provided that a suit for patent infringement might be brought "in the district of which the defendant is an inhabitant, or in any district in which the defendant . . . shall have committed acts of infringement and have a regular and established place of business."

Considering the venue status of an unincorporated association, Judge Hand first concluded that the association should be regarded as an entity rather than an aggregation of individuals. He then resolved the question of location and inhabitancy for such an entity as follows:

> "It is not altogether clear a priori how to attribute location to a collective venture even after one has called it a jural person. In the case of a corporation, courts for long evaded the difficulty by saying that it was located in the state of its incorporation within whose borders it was confined. Bank of Augusta v. Earl, 13 Pet. 519, 10 L.Ed. 274. It finally became evident, however, that this resulted in too much injustice to be tolerable, and eventually there was evolved the concept that a corporation could be 'present' outside its state, that fact being determined by the extent of its local activities. . . . Obviously the same situation arises whenever we are to determine the location of an unincorporated association. . . . *As to such an association the test must always be what it is for a corporation outside the state of its incorporation. Indeed it is troublesome to see in what other way one can attribute location to such an association at all. It does not violate common understanding to think of a common venture or enterprise as having spatial position wherever any part of those activities take place by which it is realized. That is a practicable test and*

> *it is really the only practicable test.* . . . There remains, so far as we can see, only what we have suggested; and we hold that the defendant Association was present wherever any substantial part of its activities were continuously carried on. Among those places was the Southern District of New York." (p. 411, emphasis added.)

In view of the tandem requirements of the statute, Judge Hand held that the Association, although present wherever it conducted a substantial part of its activities, was an inhabitant only of the judicial district in which it maintained its principal place of business.

Sperry Products thus resolved several crucial questions concerning the venue status of unincorporated associations. With respect to jural status, the Court held that such an association should be considered an entity for venue purposes, that it was consequently an inhabitant of the judicial district in which it maintained its principal place of business and was present wherever it maintained a regular and established place of business. The basic pervasive principle of *Sperry Products,* however, was its determination that unincorporated associations, accorded the characteristics of an entity for venue purposes, were thus comparable to and should be treated as corporations insofar as venue requirements are concerned. As Judge Learned Hand stated the matter, "It is really the only practicable test."

Since inhabitance was the requirement of the general venue statute as well as the patent infringement statute, courts generally followed *Sperry Products* in litigation involving the general venue statute. *Thermoid Co.* v. *United Rubber Workers of America,* 70 F. Supp. 228 (D.N.J. 1947); *Brotherhood of Locomotive Firemen and Enginemen* v. *Graham,* 175 F. 2d 802 (D.C. Cir. 1948).

When Congress revised the Judicial Code in 1948, the venue requirement for defendants in non-diversity cases

was stated in terms of residence rather than inhabitancy. As stated, there was no elaboration of this requirement as to defendants other than corporations. Section 1391(c) provided that a corporation was to be considered a resident of the judicial districts in which it was licensed to do or was doing business. When Section 1391(c) thus defined the residence of corporations for venue purposes, however, the governing principle of *Sperry Products* made this definition equally applicable to unincorporated associations. The Congressional history of the 1948 revisions does not indicate any purpose to impose a new or different venue requirement for unincorporated associations from that which derived from the *Sperry* principle. Professor Moore who has been described by this Court as one "having importantly to do with" the 1948 revision (*Fourco Glass Co.* v. *Transmirra Corp.*, 353 U.S. 222, 227) has stated that § 1391(c) was intended to continue and to build on the trend of judicial decisions relating to venue requirements. (Moore's Commentary on the U.S. Judicial Code, pp. 194-195.) Insofar as unincorporated associations are concerned the trend of judicial decisions was unmistakably etched by the *Sperry* case. Appropriate regard for the Congressional purpose to adhere to the reasoning of judicial authority would clearly require an analysis and treatment of residence for unincorporated associations consistent with that applicable to corporations.

That this approach is both consistent with and is justified by the 1948 revisions of the Judicial Code is emphasized by Professor Moore's discussion of the subsequent judicial decisions to that effect. Referring to decisions applying the principle of § 1391(c) to unincorporated associations, Professor Moore states:

> "The position taken by these courts is desirable and there is a built-in protection from abuse contained in

28 USC § 1404(a). Although 28 USC § 1391(c) does not on its face apply to unincorporated associations, where [as here] an unincorporated association carries on multi-state activities, application of its principle is certainly justified." (1 Moore's Federal Practice 1508 (2d ed., 1964)).[1]

The Congressional purpose and assessment of policy considerations is demonstrated by the provisions of the Labor-Management Relations Act of 1947 (29 U.S.C.A. § 141, et seq.). It is also clear from this prior enactment that Congress, at the time of the revision of the Judicial Code in 1948, was intent on liberalizing venue rather than narrowing such requirements in suits against labor organizations arising under federal statutes. The relationship between the Labor-Management Relations Act of 1947 and the revised venue provisions of the Judicial Code was analyzed in *American Airlines Inc.* v. *Air Line Pilots Association*, 169 F. Supp. 777 (S.D.N.Y., 1958), as follows:

"The soundness of the rule of the Portsmouth case, at least in so far as it applies to labor organizations, is indicated by Section 301 of the Labor Management Relations Act of 1947, enacted prior to Section 1391, which liberalized jurisdiction and venue requirements in suits against them. 29 U.S.C.A. § 185.

"Section 301 provides:

"(c) For the purpose of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

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[1] The cases referred to by Professor Moore are discussed infra, pp. 17 to 21.

"It may well be that Section 301 applies to labor organizations generally in suits arising out of federal law. This is indicated by the limited application of subdivisions (a) and (b) of Section 301 as contrasted with the apparently unlimited application of subdivision (c). Nor is this view at all inconsistent with the legislative history of this section.

"But quite apart from this, Section 301 showed the mood of Congress with respect to suits against labor organizations arising under federal law at the time when Section 1391 was passed. * * *" (p. 782, emphasis added.)

We submit, therefore, that Congress in 1948 clearly intended, considering it most practical and desirable, that unincorporated associations should be regarded as residents of the judicial districts in which they were engaged in carrying on their business activities.

This conclusion, that the intent of Congress was to liberalize venue requirements in 1948, is supported by the decision of this Court in *Pure Oil Company* v. *Suarez,* 384 U.S. 202. This Court held that the definition of residence appearing in § 1391(c) of the Judicial Code should be read into the venue requirements of the Jones Act, which had theretofore been interpreted to limit venue to a corporation's principal place of business or state of incorporation. The Court emphasized that "there is nothing to show a Congressional purpose negativing" the transposition of the 1948 residence definition appearing in § 1391(c) to the Jones Act venue requirements which first appeared in the Merchant Marine Act of 1920. This Court emphasized also the "liberalizing purpose underlying" the enactment of § 1391(c) and held that in the absence of restrictive indications in the statutory language this liberalizing purpose could and should be implemented by the described interpretation of the 1920 venue provisions of the Jones Act.

All the above circumstances evidence a comparable liberalizing intent upon the part of Congress with regard to venue requirements applicable to labor unions. There is absolutely no indication in the legislative history that Congress intended in enacting § 1391(c) to negative or restrict the application of the principles of *Sperry Products* or its successors requiring similar treatment of corporations and unincorporated associations for venue purposes. There is every reason to conclude, therefore, that the Congressional purpose was correctly implemented by the holding of the District Court in the present case.

B. The Decisions of the Federal Courts Subsequent to 1948 Support the District Court's Construction of the Current Venue Provisions.

Since the 1948 revisions of the Judicial Code, numerous cases have held that, consistent with *Sperry*, § 1391(c) applies to unincorporated associations as well as corporations.

In *Rutland Railway Corporation* v. *Brotherhood of Locomotive Engineers, et al*, 307 F. 2d 21 (2d Cir. 1962), certiorari denied, 372 U.S. 954, defendant railroad unions, including respondent in the present case, argued that venue in Vermont where defendants were representing employees was improper because their principal places of business were in Ohio (or, in the case of one defendant, Iowa) and unincorporated associations were liable to suit only in the district of their principal place of business. In holding against respondent and the other defendants, Judge Waterman stated that the 1948 revisions must be viewed in the light of pre-existing law, principally *Sperry Products:*

> "Under the venue provision drafted in 1948 courts were faced with the question whether they should follow Judge Hand and hold that an unincorporated associa-

> tion resides only at its principal place of business, or whether the process of assimilation which Judge Hand advocated should be extended by assimilating the treatment of unincorporated associations for venue purposes with the newly expanded concept of corporate residence." (p. 29.)

Judge Waterman went on to hold:

> ". . . we follow the reasoning in Sperry Prods. and assimilate the residence of unincorporated associations under 28 U.S.C. § 1391(b) to that of corporations, 28 U.S.C. § 1391(c). Since the residence of a corporation for venue purposes has been expanded to include all the judicial districts in which the corporation is doing busines , the residence of an unincorporated association for venue purposes should likewise be expanded to include all the judicial districts in which the unincorporated entity is doing business. We believe this accords with the practical requirements of litigation involving unincorporated associations. If an unincorporated union is carrying on sufficient activities in a particular judicial district so that it is deemed to be doing business there, it usually will suffer no undue hardship if required to stand suit there. If in certain instances the defense of a suit in a particular district is peculiarly oppressive, the association may always seek a transfer of the action under 28 U.S.C. § 1404(a) (1958)." (pp. 29-30.)

The District Court in this proceeding correctly concluded, under *Rutland*, that the Brotherhood of Railroad Trainmen resides in and is "doing business" in Colorado for venue purposes. The ruling of the Court of Appeals below squarely conflicts with the Rutland decision and other authorities.

American Airlines v. *Air Line Pilots Association, International*, 169 F. Supp. 777 (S.D.N.Y. 1958) also held that § 1391(c) was intended to apply to unincorporated associa-

tions under the *Sperry* principle. In that case Judge Bryan said (at p. 782):

> ". . . it is plain from the Sperry case that under the general venue statute the word 'inhabitant' meant the same thing when used with respect to an unincorporated association as it did when used with respect to a corporation. Cf. Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 77 S.Ct. 787, 1 L.Ed. 2d 786.
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> "Thus, when Section 1391 was enacted in 1948 and changed the venue requirement from 'inhabitant' to 'resident' it was already the law as laid down by Judge Hand that an unincorporated association should be treated for venue purposes in the same manner as a corporation. Indeed, as the Supreme Court has indicated, the passage of § 1391 was not intended to change the law in any respect. Fourco Glass Co. v. Transmirra Corp., supra. So also the revisers' notes to Section 1391 indicate."

Other cases to the same effect as *Rutland* and *American Airlines* include *Portsmouth Baseball Corp.* v. *Frick,* 132 F. Supp. 922 (S.D.N.Y. 1955); *Chicago & North Western Ry. Co.* v. *Brotherhood of Locomotive Engineers,* 202 F. *Supp.* 277 (S.D.Ia. 1962); *Eastern Motor Express* v. *Espenshade,* 138 F. Supp. 426 (E.D.Pa. 1956) and *R & E Dental Supply Co., Inc.* v. *Ritter Co., Inc.,* 185 F. Supp. 812 (S.D.N.Y. 1959).

Professor Moore commends these decisions, characterizing them as "desirable" and "justified" under the 1948 venue provisions (1 Moore's Federal Practice (2d ed. 1964), p. 1508). To the same effect see Note, Federal Venue for Unincorporated Associations, 44 Cal. L. Rev. 130, 136, 140 (1956); Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983, 1080 (1963).

Several cases, without considering the change in the law wrought by the 1948 revisions, have professed to follow the

Sperry case in holding that an unincorporated association resides only at its principal place of business. *McNutt* v. *United Gas Workers,* 108 F. Supp. 871 (W.D.Ark. 1952); *Griffin* v. *Illinois Central R.R.,* 88 F. Supp. 552 (N.D.Ill. 1949); *Salvant* v. *Louisville & N.R. Co.,* 83 F. Supp. 391 (W.D.Ky. 1949). These cases justify this conclusion by citing *Brotherhood of Locomotive Firemen and Enginemen* v. *Graham,* 175 F. 2d 802 (C.A.D.C. 1948). In the *Graham* case, however, the Court of Appeals based its decision on the provisions of the Judicial Code preceding the 1948 revisions, noting that the trial court had relied upon the pre-1948 venue provisions (fn. 2, p. 804).

The only case since 1948 where it appears that a court refused to follow the principle that an unincorporated association should have the same venue as a corporation under § 1391(c) is *Cherico* v. *Brotherhood of R. R. Trainmen,* 167 F. Supp. 635 (S.D.N.Y. 1958). That case was later rejected, however, by the Court of Appeals for the same circuit in *Rutland Railway Co.* v. *Brotherhood of Locomotive Engineers,* 307 F. 2d 21, 29 (2d Cir. 1962).[1]

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[1] Section 1391(b) of the venue statute was amended by Public Law 89-714, approved on November 2, 1966, by addition of the italicized words in the following quotation of that Section:

> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, *or in which the claim arose,* except as otherwise provided by law."

The same words were added to Section 1391(a). As the Congressional Committee Reports state, this amendment is intended to provide an additional choice of forum for litigants in the federal courts:

> "Subsection 1391(b) would be amended to authorize a civil action wherein jurisdiction is not founded solely on diversity of citizenship to be brought in the judicial district in which the claim arose as well as the district where all defendants

It is thus indisputable that the decision of the Court of Appeals in the present case, holding that venue as to an unincorporated association is proper only where it maintains its principal place of business, is in conflict with and contrary to the weight of authority represented by the *Rutland* case, and the other cases discussed and cited above.

Significantly, the *Rutland* case and the present case involve the same basic facts and a common unincorporated association. In *Rutland,* the Brotherhood of Railroad Trainmen was one of the four appellants raising the venue question (307 F. 2d 21, 24). Moreover, the activities of the Brotherhood upon which the Court predicated its conclusion that venue was proper in Vermont are the same type as those shown by the record in the present case. The activities in *Rutland* were described by the Court as follows:

> "Turning to the case before us, we hold that the defendant brotherhoods were doing business in the District of Vermont. They set up and maintained grievance committees and other facilities among the employees of the Rutland Railway in Vermont. They organized a strike of railroad employees in Vermont. They negotiated with the management of the plaintiff railroad in Vermont. Therefore, we conclude that venue for this action in the District of Vermont was

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reside." (Report No. 1893, Committee on the Judiciary, House of Representatives, 89th Cong., 2nd Sess., pp. 1-2.)

Since Congress obviously amended the statute to expand the forums available under the prior venue provisions, a definition of residence more restrictive than that properly attributable to the pre-existing statute would conflict with the implicit Congressional purpose. Consequently, the question as to the residence of unincorporated associations for venue purposes remains one of paramount importance on which the Tenth and Second Circuits are in basic disagreement.

proper and we affirm the order of the court below denying the motions to dismiss." (p. 30.)

In the instant case, as in *Rutland,* venue is especially appropriate in the district in question, for the challenged activities occurred there, the Brotherhood concededly does business there, and respondent Carroll resides there (R. 5-6, 11-12, 73).

C. The Basic Venue Principles Enunciated by this Court and the Circumstances of this Case Clearly Establish that the Judicial District of Colorado is the Most Appropriate Forum.

Commenting on the 1948 revisions of the Judicial Code, this Court in *Pure Oil Co.* v. *Suarez,* 384 U.S. 202, stated that the venue provisions of § 1391 were designed to "bring venue law in tune with modern concepts of corporate operations" (p. 204), and constituted "a response to a general conviction that it was intolerable if the traditional concepts of residence and presence kept a corporation from being sued wherever it was creating liabilities" (fn. 3, p. 204).[1] In the earlier case of *Neirbo Co.* v. *Bethlehem Corp.,* 308 U.S. 165, where this Court dealt comprehensively with the question of proper venue, the underlying basis of the decision was the principle that venue "though defined by legislation relates to the convenience of litigants" (p. 168). The principles thus enunciated, which are fully applicable to unincorporated associations conducting multi-state business activities, clearly support the conclusion that the judicial district of Colorado is the proper and most appropriate forum in the present case. The particular activities upon

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[1] The decision of the lower court, which this Court affirmed, expressed these basic considerations as follows:

"There is a shocking inconsistency in a rule of law which permits a corporation to maintain a regular, established place

which liability is predicated, the outward manifestations of the collective bargaining relationship between the parties and the focal instrumentalities and processes through which the Brotherhood acts as a representative of the Rio Grande's employees are all Colorado oriented. The holding of the Court of Appeals that Cleveland, Ohio, is the proper forum for the trial of this case is thus completely contrary to the recognized and fundamental determinants of proper venue.

The plaintiff involved in the dispute obviously conducts the vast majority of its operations in the judicial district of Colorado (R. 57). The officers of the employing railroad who are involved in labor relations matters work and reside in Colorado and the decisions made by such officers in labor disputes involving the Brotherhood of Railroad Trainmen and the Rio Grande are made and are effectuated in the judicial district of Colorado (R. 147-148).

Insofar as the Brotherhood and its members are concerned, the immediate activity giving rise to this proceeding took place in the judicial district of Colorado. The unlawful strike occurred primarily in Colorado although it

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of business in the district in question, transact a substantial amount of business there both before and after the event about which the plaintiff complains and at the time the suit is filed with the expressed intention to continue doing business in such locale, but allows the corporation to insist on a trial of the factual issues in the district in which it is incorporated or in which its principal office is located. To do so would authorize it 'to run with the hare and hold with the hound.'

". . . it would be unjust to permit the offending corporation to continue its operations, in the course of which it also may be creating liabilities, and at the same time to grant it complete immunity from those liabilities by shielding it with a carapace of technical venue construction." (*Pure Oil Co.* v. *Suarez*, 346 F. 2d 896-97.)

also affected the operations of the Rio Grande in other states (R. 18, 59). Most of the employees participating in the strike on behalf of the Brotherhood of Railroad Trainmen were and are residents of Colorado and the service which they perform for the Rio Grande is performed in Colorado.

Further, the entire collective bargaining relationship between the Brotherhood and the Rio Grande, and the Brotherhood's activities on behalf of the Rio Grande's employees whom it represents, has Colorado as its focal point. Although the entity (Brotherhood of Railroad Trainmen) certified to represent trainmen on the Rio Grande has its principal place of business at Cleveland, Ohio, it is a party to the basic collective bargaining agreement between the Brotherhood and the Rio Grande *only* by virtue of the signature of General Chairman R. E. Carroll on its behalf. General Chairman Carroll is a resident of Colorado and maintains his place of business at Denver, Colorado.[1] Thus, with regard to the governing agreement and the basic collective bargaining relationship, the national union entity with its principal place of business at Cleveland, Ohio, is represented by and performs its functions on the Rio Grande through a Colorado resident whose activities are concentrated geographically in the judicial district of Colorado.

In the day to day functioning of the collective bargaining relationship, the disputes which may arise involve either

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[1] The collective bargaining agreement between the parties is referred to in the amended complaint, by the Brotherhood in its proposed findings of fact, and is identified by the District Court (R. 7, 46, 58). Although the entire document consisting of 155 printed pages is not reproduced in the record, it is on file with the National Mediation Board as required by § 5, First(c) of the Railway Labor Act (45 U.S.C.A. § 155, First(c)).

proposed changes in the existing agreement or disputes concerning its interpretation or application. This Court has described those traditional disputes in terms of "major" and "minor" disputes (*E.J. & E. Ry. Co.* v. *Burley*, 325 U.S. 711). The manner in which the activities of the Brotherhood in such disputes, as the certified representative of trainmen on the Rio Grande, focus on Colorado is evident from an examination of the Constitution and General Rules of the Brotherhood of Railroad Trainmen reproduced in Appendix B hereto.

As the Constitution and General Rules show, the Brotherhood consists of a grand lodge with headquarters at Cleveland, Ohio, and a series of subordinate lodges, each located on the lines of the railroads on which the Brotherhood holds representation rights (App. B, p. 43). On each railroad the Constitution requires the local lodges to form a general grievance committee and it is this general grievance committee on the Rio Grande which is headed by respondent Carroll (App. B, pp. 44-45). With respect to grievances or so-called minor disputes, the Constitution and General Rules invest the local committees and finally the general grievance committee with virtually complete authority to initiate, confer, negotiate and otherwise handle claims on behalf of the trainmen employed by the Rio Grande (App. B, pp. 44-46). Ultimate reference of such claims to the National Railroad Adjustment Board is also within the authority of the general grievance committee as shown by the claims and the awards involved in the present litigation (Awards 19372 and 19389 of the First Division of the National Railroad Adjustment Board). The local handling of such disputes is in fact contemplated by the provisions of the Railway Labor Act in addition to the Constitution and General Rules of the Brotherhood. Thus § 2, Sixth of the Act provides that the conferences

to be held with respect to disputes arising out of grievances or out of the interpretation or application of agreements shall be held upon the line of the carrier involved (45 U.S.C. § 152, Sixth).

The general grievance committee and its constituent local committees on the Rio Grande as well as the other railroads are also given primary jurisdiction to initiate and progress proposals for changes in the agreement which may eventuate in so-called major disputes under the Railway Labor Act.[1] The real and primary authority of the representatives of the Brotherhood operating in the form of the general grievance committee is indicated by General Rule 13 which provides as follows:

> "Whatever action may be taken by the general grievance committee of any system within the meaning of the above general rules shall be law to the lodges on that road or bus line until or unless reversed by the Board of Appeals." (App. B, p. 50)

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[1] The functions and official capacity of the General Chairman and the local committees on an individual railroad in major disputes arising out of proposed contract changes are described by Judge Holtzoff in recent litigation involving the nation's railroads and the Brotherhood of Railroad Trainmen as follows:

> "The defendant Brotherhood of Railroad Trainmen, as its name indicates, is composed of trainmen employed by various railroads. It is likewise a national organization, with its headquarters in Cleveland. Its President is Charles Luna, who is aided by an assistant and vice presidents assigned to various regions. An official of the Union, known as a General Chairman, is attached to every railroad or group of railroads. In turn, he is assisted by local committees. Conferences involving a single railroad are ordinarily conducted either by a local committee, or by the General Chairman assigned to the carrier . . . ."
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> (*Atlantic Coast Line R. Co. et. al.* v. *Brotherhood of Railroad Trainmen*, 262 F. Supp. 177, 185 (D.D.C., 1967))

As stated, the instrumentality acting on behalf of the Brotherhood which formulates the "law" on the Rio Grande is a locally constituted and locally centered instrumentality.

Although the president of the Brotherhood, who maintains his office at Cleveland, Ohio, does exercise residual supervisory or appellate authority, the general structure of the Brotherhood clearly demonstrates that its activities on behalf of the employees of an individual railroad such as the Rio Grande are initiated, conducted and, in most cases, concluded in the geographical area where the railroad operates. General Rule No. 12, which deals with participation by grand lodge officers in the organization's activities on an individual railroad, limits such participation to the situations in which the general grievance committee makes a proper request of the president (App. B, p. 49). Following such a request the general grievance committee on the individual carrier continues to participate in the activities of the Brotherhood jointly with the president or other assigned officer of the grand lodge. Such joint participation in the present case is indicated by the fact that Vice President McDonald and General Chairman Carroll conducted the negotiations and discussions with the Rio Grande just prior to the strike in question and jointly signed the letter advising the Rio Grande that the strike would commence at a specified time (R. 23, 147-148).

A provision of General Rule No. 12, which is of particular importance here, relates to the manner in which strike action on an individual railroad must be authorized. The relevant provision is as follows:

> ". . . the matter will be referred to the full general grievance committee, with a concise statement of the entire controversy, together with the result of their attempt to adjust the controversy with the managing officers of the property, and if two-thirds or more of the

members of the general grievance committee vote in favor of withdrawing from the service rather than continue under the conditions specified by the company, the President of the Brotherhood and the general grievance committee shall have authority to sanction a strike, that is, to approve of a concerted and peaceable withdrawal from the service of all members of the Brotherhood employed in train, yard or bus service on the system or part thereof affected; provided, however, nothing in this rule shall prohibit the circulation of a referendum strike ballot when it appears that the best interests of the membership would not be jeopardized by the delay incident thereto." (App. B, pp. 49-50)

Thus even the final step in the process is one in which the general grievance committee is the major participant. The president may authorize the strike only if the general grievance committee joins with him in such authorization and the possibility is always open that a referendum of the membership on the property may be used to decide the question.

These provisions make it highly unreasonable to suggest that Cleveland, Ohio, rather than the judicial district of Colorado is the proper forum in which to litigate the liability of the Brotherhood with respect to the unlawful strike conducted on the Rio Grande. The Brotherhood's business of representing employees of the Rio Grande, although based on certification of the national entity, is conducted in Colorado by duly authorized officials of the Brotherhood who are residents of Colorado. Here, as would be true in many situations involving the Brotherhood's multi-state activities, Cleveland, Ohio, simply has no real relationship to the basic activities and the significant facts involved in the litigation. The basic determinants of proper venue, as enunciated by this Court, thus clearly support the conclusion of the District Court that the judicial district of Colorado is the proper forum.

This interpretation of the residence requirements of § 1391 of the Judicial Code does not leave the Brotherhood without adequate safeguards against inconvenient forums. In the first place, a determination must be made in each case as to whether or not the unincorporated association is doing business in the judicial district chosen by the plaintiff. In the present case (as in the *Rutland* case) this requirement was met by showing the very substantial activity on the part of the Brotherhood in the judicial district concerned. Furthermore, a transfer may be sought in any event under the provisions of § 1404 of Title 28 of the Judicial Code if inconvenience can be shown by the defendant. Both these requirements and available procedures serve as ample protection against an improper or unreasonable choice of forum by the plaintiff.

II. STEELWORKERS v. BOULIGNY, INC., 382 U.S. 145, IS IRRELEVANT TO THE VENUE QUESTION INVOLVED AND CANNOT ON ANY THEORY SUPPORT THE RESULT REACHED BELOW.

In holding that venue as to the Brotherhood of Railroad Trainmen is proper only at Cleveland, Ohio, the Court of Appeals was governed primarily by its interpretation of this Court's decision in *Steelworkers* v. *Bouligny, Inc.*, 382 U.S. 145. The opinion of the Court of Appeals does not reflect any effort at statutory interpretation or any basic disagreement with the principle and policy of the *Rutland* case. Instead, the Court based its decision on the conclusion that (1) *Steelworkers* v. *Bouligny* was an implicit "rejection of the principle espoused by the *Rutland* case" and that (2) venue as to the Brotherhood would thus be proper only at the Brotherhood's principal place of business, i.e., Cleveland, Ohio. We respectfully suggest that both aspects of this conclusion are erroneous.

A. *Steelworkers* v. *Bouligny* was not in any Way Concerned With Venue Principles or Cases.

The *Steelworkers* case did not involve any venue questions, and this Court neither discussed nor cited any cases dealing with venue principles. The issue presented in the *Steelworkers* case, as this Court stated, was "whether an unincorporated labor union is to be treated as a citizen for purposes of federal diversity jurisdiction, without regard to the citizenship of its members" (382 U.S. 145, 147). The lower court had held that for diversity purposes, the citizenship of an unincorporated association is that of each of its members. This Court affirmed, rejecting the argument that an unincorporated association should be considered an entity and a citizen of the state in which it maintained its principal place of business. The Court emphasized that if an unincorporated association were treated as a jural entity for diversity purposes with its citizenship determined as if it were a corporation, a considerable expansion of the diversity jurisdiction of federal courts would inevitably follow. Holding that only Congress under Article III of the Constitution can extend the jurisdiction of federal courts, the Court stated that such "pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts" (*Id.* at 150-51). In the present case, jurisdiction is based on alleged violations of a federal statute and the venue question thus does not involve an expansion or contraction of federal court jurisdiction.

In holding that the citizenship of each individual member of an unincorporated association governs for diversity purposes, the Court adhered to a long established principle (*Chapman* v. *Barney*, 129 U.S. 677). The federal courts,

however, have distinguished between the principles applicable when determining the citizenship of an unincorporated association for diversity jurisdiction and those relevant to a determination of the inhabitancy or residence of an unincorporated association for venue purposes. These different principles have co-existed and there is nothing about the *Steelworkers* case which indicates any intent or need to change the existing principles.

This concurrent but unrelated development of venue and jurisdictional principles is illustrated by *Sperry Products* v. *Assn. of American Railroads, supra.* Judge Learned Hand carefully distinguished the jurisdictional considerations and stated, as this Court held in *Steelworkers,* that:

> ". . . [I]n the matter of jurisdiction over the subject matter, an unincorporated association is disregarded: when for example jurisdiction depends upon diversity of citizenship, it is the citizenship of the members alone which counts. Levering & Garrigues Co. v. Morrin, 2 Cir., 61 F. 2d 115. Thus, for most purposes the law still looks at such associations as mere aggregations of individuals." (pp. 410-411.)

He then observed, however, that different principles should determine the venue question before him:

> "Since, however, for the purpose of suit it [United Mine Workers v. Coronado Coal Co., 259 U.S. 344; Rule 17(b) of Federal Rules of Civil Procedure] has come to regard them as jural entities, we can see no reason why that doctrine should not be applied consistently to other procedural incidents than service of process, and venue is one of such incidents." (p. 411.)

Thus recognizing that different principles apply in determining inhabitancy of an unincorporated association for venue purposes as contrasted with determination of citizen-

ship for jurisdictional purposes, Judge Hand held that the unincorporated entity should be treated as a corporate entity in order to determine its inhabitancy for venue purposes.

Similarly, in *Rutland Railway Corporation* v. *Brotherhood of Locomotive Engineers,* the Court of Appeals for the Second Circuit noted that "Venue in the Federal Courts is not a jurisdictional concept" (307 F. 2d 21, 29). The essential issue presented to the court in the *Rutland* case was whether or not the process initiated by Judge Hand in *Sperry Products* should be continued by applying to unincorporated associations the corporate venue requirements of the Judicial Code as amended in 1948, just as Judge Hand had applied such requirements to unincorporated associations prior to the 1948 amendments. As stated, the issue before this Court in the *Steelworkers* case did not involve any such question. This Court neither cited nor purported to disapprove cases such as the *Rutland* case involving venue determinations. In substance and effect, this Court approved the prior decisions relating to diversity jurisdiction and refused to attribute to unincorporated associations a citizenship apart from the citizenship of all of its individual members. This holding with respect to the citizenship of unincorporated associations is wholly irrelevant to the venue issue presented here.

The holding of the Court of Appeals in this case assumed that this Court, in upholding a long standing jurisdictional principle, overruled a long line of venue cases without the slightest reference to them and that it established basic venue doctrine without any mention of the subject. This Court's opinion, however, carefully confined its holding to the precise issue raised. Thus, this Court's statement of the issue limits it to a determination of the citizenship of

an unincorporated labor union "for purposes of federal diversity jurisdiction" (382 U.S. 145, 147), and in evaluating the arguments advanced by counsel representing the unincorporated association the Court limited itself to "the force of these arguments in relation to the diversity jurisdiction" (382 U.S. 145, 150). The concluding paragraph of the opinion emphasizes again that the decision is limited to the status of unincorporated labor unions "for diversity purposes" (p. 153). We respectfully submit that the decision by this Court, affirming its prior determinations with respect to the status of unincorporated associations for diversity purposes, cannot and should not be read to accomplish the rejection of numerous cases and principles which have prevailed for many years with respect to the venue of federal courts.

B. *Steelworkers* v. *Bouligny*, if Deemed Relevant to Venue Questions, Conflicts With the Decision of the Court of Appeals.

Even if the principles affirmed in *Steelworkers* v. *Bouligny*, 382 U.S. 145, were relevant to venue questions, the lower court's resolution of what it described as the vital venue issue in the present case is inconsistent with the *Steelworkers* decision. The Court of Appeals stated the question to be decided as follows:

> "Venue here depends upon whether the Brotherhood is held to reside within the judicial district of Colorado or in Cleveland, Ohio, where its headquarters and principal place of business is located." (R. 151.)

Apparently the court below resolved the issue so posed by deciding that the Brotherhood is a resident of Cleveland, Ohio, where it has its principal place of business. This result, however, can only be reached by treating the

Brotherhood, an unincorporated association, as an entity and thus arriving at a result comparable to that reached by Judge Hand in *Sperry Products*. As the preceding discussion shows, Judge Hand and subsequent courts assimilated an unincorporated association to a corporation. In the absence of such assimilation, the unincorporated association would be regarded as an inhabitant or resident of the places inhabited by its members or at which its members reside.[1]

A similar result would follow from applying the rationale of the *Steelworkers* case to the venue residence problem here involved. This Court in *Steelworkers* recognized that unless it treated the unincorporated association as a corporation for purposes of determining its citizenship, "the generally prevailing principle that an unincorporated association's citizenship is that of each of its members" would control for diversity purposes (382 U.S. 145, 146). Consequently, if the decision of this Court in *Steelworkers* were controlling, then the residence of the Brotherhood for venue purposes would necessarily be the aggregate residence of its members, not its principal place of business. Thus, the *Steelworkers* decision cannot possibly be used to arrive at the result indicated by the court below.

A logical application of the *Steelworkers* rationale would have required the court below to reject both of the alternatives posed in its statement of the crucial issue quoted above. Attempting to apply the principles of *Steelworkers* to the concept of residence for venue would result in holding that the residence of the Brotherhood is not Colorado or Cleveland, Ohio, but is instead the aggregate of all of the many

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[1] Judge Hand recognized this consequence, stating:

"... for most purposes the law still looks at such associations as mere aggregations of individuals." (132 F. 2d 408, 411.)

states or judicial districts in which its members reside. In the case of the Brotherhood of Railroad Trainmen, which has members in virtually every judicial district, the residence requirement of § 1391 could never be met since there is no single judicial district in which all of its members reside. If such an interpretation of residence for venue purposes prevailed, no national union or widespread unincorporated association prior to November 1966[1] could have been made a defendant in any federal court with venue based on Section 1391(b), despite the obvious Congressional desire to provide an effective federal forum for the vindication of rights based on federal statutes.

Insofar as venue issues in this case are concerned, the recent decision of this Court in *Pure Oil Company* v. *Suarez*, 384 U.S. 202, is considerably more relevant than the *Steelworkers* decision. In the *Pure Oil* case this Court had before it the venue requirements of the Jones Act which provided that venue would be proper in the district in which the defendant employer resides or in which his principal office is located. This Court stated the issue and its resolution thereof as follows:

> "Preliminarily it should be noted that although this provision is framed in jurisdictional terms, the Court has held that it refers only to venue, *Panama R. Co.* v. *Johnson*, 264 U.S. 375. It is conceded that as enacted and originally interpreted the statute would not authorize Florida venue in this instance, for corporate residence traditionally meant place of incorporation, in this case Ohio, and Pure Oil's principal office is in Illinois. The Court of Appeals held, however, that residence has been redefined by the expanded general venue statute,

[1] The expansion of available forums under the venue sections of the Judicial Code, accomplished by the November 1966, enactment of Public Law 89-714, is discussed at page 20, *supra*.

28 U.S.C. § 1391(c) (1964 ed.), passed in 1948. That statute provides:

> "'A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the *residence* of such corporation for venue purposes.' (Emphasis added.)

"If this definition of residence is applicable to the Jones Act venue provision, it is conceded that the action was properly brought in Florida, where Pure Oil has transacted a substantial amount of business. We hold that this definition does so apply and that venue in Florida was proper." (pp. 203-04.)

This Court stated the controlling principle as follows:

> "Although there is no elucidation from statutory history as to the intended effect of § 1391(c) on special venue provisions, the liberalizing purpose underlying its enactment and the generality of its language support the view that it applies to all venue statutes using residence as a criterion, at least in the absence of contrary restrictive indications in any such statute." (pp. 204-05.)

The substance of this Court's decision in the *Pure Oil* case is that the subsequent definition of residence for venue purposes contained in the general venue statute should be applied to the venue requirement of the Jones Act, although the amendment to the general venue statute does not expressly indicate an intent to thus amend the requirements of the Jones Act. The same approach in the present case would require the result reached by the Court of Appeals for the Second Circuit in the *Rutland* case. The essential effect of the *Rutland* case was to update the concepts formulated by Judge Hand in *Sperry Products* to make them consistent with the 1948 amendments, just as the

Pure Oil case updated the venue requirements of the Jones Act.

III. THE COURT OF APPEALS CLEARLY ERRED IN SETTING ASIDE THE JUDGMENT OF THE DISTRICT COURT HOLDING R. E. CARROLL LIABLE FOR THE DAMAGES ACCRUING FROM THE UNLAWFUL STRIKE.

On the basis of the record, the District Court concluded that respondent Carroll shared responsibility for the unlawful strike and should therefore be held accountable for the damages sustained by the Rio Grande. The Court of Appeals set this judgment aside without any reference to the scope of review in such instances. Its action, we submit, was contrary to the principle that "findings of fact shall not be set aside unless clearly erroneous" (Fed. R. Civil P. 52(a)).

Respondent Carroll's responsibility for the strike is most conclusively fixed by the documents of record relating to the institution and cessation of that illegal withdrawal from service. With respect to the institution of the strike, counsel for the Brotherhood stated that the strike was called "pursuant to a letter that was sent to the railroad on May 16 . . ." (R. 28). The crucial document thus identified is a letter addressed to the Rio Grande stating that "the strike of brakemen is reset for 2:00 P.M., May 16, 1960" (Ex. 1, R. 147-148). This letter, emanating from respondent Carroll's Denver office, is signed by two individuals, R. H. McDonald, Vice President of the Brotherhood of Railroad Trainmen, and R. E. Carroll, General Chairman of the Brotherhood of Railroad Trainmen. This document reflects the fact that the overall responsibility of the Brotherhood in the premises was shared by respondent Carroll as the General Chairman of the Brotherhood of Railroad

Trainmen and Mr. McDonald as a vice president of the Brotherhood of Railroad Trainmen.[1]

With respect to the status and termination of the strike, respondent Carroll testified that he issued instructions "calling off the strike" by "telephoning and sending the telegrams" (R. 74-75). Respondent Carroll's testimony on this subject clearly shows that his authority in the premises was primary and that his instructions were final and determinative as to whether the strike was to continue or terminate. Accordingly, the District Court correctly found and concluded that respondent Carroll was responsible for, and was liable for the damages resulting from the unlawful strike.

The Court of Appeals suggested that since the local chairmen were dismissed from the action, respondent Carroll also should have been dismissed (R. 152). It was the view of the Court of Appeals that "Carroll had no more to do with causing the strike than did the chairmen of the locals . . ." (R. 152). This statement is contrary to all of the evidence relating to the subject. There is no evidence of record that the local chairmen were responsible for instituting the strike in question. The significant difference in the record between respondent Carroll's situation and that of the local chairmen was, in fact, recognized by counsel for the Brotherhood during the trial in the District Court. At the pretrial conference when the documents referred to above had been produced, counsel for the respondents stated:

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[1] This is also obvious from the provisions of the Constitution and General Rules of the Brotherhood which require joint authorization of a strike by the president or his designee and the General Grievance Committee of which respondent Carroll is Chairman (App. B, pp. 49-50).

> "Any of the documents that have been produced would only show that Mr. Carroll was *the only one who had any connection with it at all.*" (R. 36, emphasis added.)

At the conclusion of the trial in the District Court the proposed findings submitted by the respondents recognized this state of the record. Thus, proposed finding No. 7, submitted by respondents, was as follows:

> "The Trial record does not sustain the allegations of the complaint with respect to B. E. Roark, A. J. Myers, J. W. Crocker, M. C. Brown, Carl F. Ahrens, N. E. Doolittle, and M. C. Feather. These defendants are not shown to have participated in any way in the calling or conduct of the strike nor is there any evidence with respect to their relationship, if any, with the Brotherhood." (R. 48.)

Respondent Carroll is not among the individuals listed in this proposed finding.

Counsel for respondents emphasized both the absence of any evidence of responsibility on the part of the local chairmen and the undoubted responsibility of respondent Carroll at the conclusion of the trial, as shown by the following:

> "The Court: There is another matter I think we might iron out here and now. The case is against the Brotherhood of Railroad Trainmen and certain named individuals.
>
> "Now, with the exception of Mr. Carroll, I haven't heard any testimony about these other individuals.
>
> "Mr. Cummings: That was briefed before Judge Phillips, Your Honor, and—
>
> "Mr. Highsaw: The question that was briefed before Judge Phillips, Your Honor, was whether or not having named these people in the complaint they had properly stated a class action, but now we have had

> in evidence and the record is closed on the question of the strike and I agree with you there is no evidence at all that anyone had anything to do with this strike *other than* the Brotherhood and Mr. Carroll, ..." (R. 145, emphasis added.)

It is apparent, therefore, that at the conclusion of the proceedings in the District Court there was agreement between all of the parties that responsibility for the strike was that of respondent Carroll and the Brotherhood.

The Court below also suggested as a reason for its ruling that respondent Carroll "was not an officer of the union" (R. 152). When respondent Carroll testified in this action he identified himself as "General Chairman of the General Grievance Committee, Brotherhood of Railroad Trainmen on the D&RGW" (R. 73). An affidavit by respondent Carroll reiterates his official capacity as "chairman of the General Grievance Committee of the Brotherhood of Railroad Trainmen for the Denver and Rio Grande Western Railroad system" (R. 11).

The General Grievance Committee, of which respondent Carroll is the Chairman, is the agency through which the Brotherhood functions insofar as its representation rights on the Rio Grande are concerned and respondent Carroll, of course, is the head of that instrumentality. Perhaps the clearest proof of the important official capacity which respondent Carroll occupies in the Brotherhood is the fact that the basic collective bargaining agreement between the Rio Grande and the Brotherhood is signed on behalf of the Brotherhood by respondent Carroll alone. There is no other Brotherhood signatory to that agreement, which respondent Carroll signed as "General Chairman, Brotherhood of Railroad Trainmen."

This case was tried by the District Court without a jury. Pursuant to Rule 52(a) of the Federal Rules of Civil Pro-

cedure, in such cases the "findings of fact shall not be set aside unless clearly erroneous." This Court has stated in *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 395 (1948) that:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

We most respectfully submit that the entire evidence shows that respondent Carroll is not only an officer of the Brotherhood but is the governing officer of that organization on the Rio Grande. Accordingly, the District Court's determination that respondent Carroll was responsible for the damages caused by the Brotherhood's unlawful strike was clearly correct and the action of the Court of Appeals in setting it aside was erroneous.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed with directions to the Court of Appeals to proceed to a consideration of the issues other than venue which were raised by the appeal from the judgment of the District Court.

Respectfully submitted,

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March 15, 1967.

APPENDIX A

§ 1391 of Title 28, United States Code. Pertinent provisions are:

> "(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.
>
> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.
>
> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Rule 52(a) of the Federal Rules of Civil Procedure:

> "(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963."

APPENDIX B

EXCERPTS FROM CONSTITUTION AND GENERAL RULES OF THE BROTHERHOOD OF RAILROAD TRAINMEN ON FILE WITH THE DEPARTMENT OF LABOR PURSUANT TO § 201(a) OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

Name and Style.

Sec. 1. This organization shall be known in name and style as the "Brotherhood of Railroad Trainmen" and shall consist of one Grand Lodge, composed as hereinafter provided, and of such subordinate Lodges as may hold legal and unreclaimed charters granted by the Grand Lodge.

Name—Of What Composed.

Sec. 75. A subordinate lodge shall consist of at least ten members and shall be hailed and entitled ..... Lodge No. ..... of the Brotherhood of Railroad Trainmen, holding a legal and unreclaimed charter, granted by the President of the Brotherhood of Railroad Trainmen. It cannot voluntarily surrender its charter so long as ten members in good standing object thereto.

Jurisdiction and Authority.

Sec. 79. The jurisdiction of the lodge shall be that assigned to it by the President of the Brotherhood of Railroad Trainmen. It shall have jurisdiction over all members of the Brotherhood residing within its limits or employed on the system which it represents. Its decisions upon all matters within the power and limits of subordinate lodges of the Brotherhood shall be final unless appealed to and reversed by the President of the Brotherhood. It shall have the power to punish members for misconduct and

violation of obligation, and may summon witnesses and provide penalties for their non-attendance.

Duties of Grievance Committee.

Sec. 101. It shall be the duty of the local grievance committee to adjust all grievances that may be referred to it by the lodge, as per Rule No. 5 of the General Rules of the Constitution. It shall be the duty of the local chairman to investigate and adjust all schedule rule violations brought to his attention and where time has not been claimed for schedule violation the local chairman may make time claims for such violations of schedule, reporting his action at the next lodge meeting. Local chairmen will not be required to handle grievances arising as a result of minor personal injuries beyond the time lost and expenses incurred.

GENERAL RULES

Local Grievance Committees.

No. 1 (a) All subordinate lodges shall elect local grievance committees for each division or system represented in the lodge by five or more members, said committees to consist of three, namely, chairman, vice chairman and secretary, to be elected from among and by the members in actual train, yard or bus service on the division or system which the committee is to represent. . . .

General Grievance Committee—Elections.

No. 2 (a). On any line or system of railroad or bus company there shall be a general grievance committee formed in the month of January following the quadrennial election of local grievance committees for that line *and must* consist of the chairmen of the local grievance committees on that line of road, except that chairmen employed as yardmasters and representing yardmasters only may be members of the

general committee when the full general committee and the President approve. . . .

No. 2 (b). The officers of a general grievance committee shall be elected on the final day of the quadrennial formation, except the chairman who may have already been elected by referendum, and shall consist of a chairman, vice chairman, and secretary, whose terms of office shall be for four years, or until their successors have regularly qualified. . . .

Duties of General Grievance Committee.

No. 3. It shall be the duty of each general grievance committee carefully to investigate all matters lawfully placed in its hands. It shall have the power to alter, amend, add to, or strike out, any part or all of any complaint or claim submitted to the committee, except that a statute of limitation of two years is hereby declared in connection with the handling of any cases of uncontested seniority (applicable only to cases involving position and seniority rank on seniority rosters); and, further provided, that no case for reinstatement shall be accepted for handling by local lodge or local or general committee after the expiration of two years from date of dismissal, except where otherwise provided by schedule rules. After the committee has decided on the justness of any claim or complaint, it shall proceed with an effort to adjust the same with the general officers of the road or line in accordance with General Rule No. 10. General chairmen will be required to handle with any carrier any claim or grievance that has been appealed to the full general committee provided any limitation agreement exists on the property, and it shall be mandatory that the general chairman try to reach agreement with the management to extend the time limit. A general grievance committee or subcommittee thereof or an officer representing the Grand Lodge assisting a general committee shall not nego-

tiate an agreement with a carrier involving the changing of recognized home and other terminals in either pool or assigned freight or passenger service, or the reassignment of crews in connection therewith, without first circulating a referendum ballot to all members who hold seniority rights and are paying general grievance committee assessments on each seniority district, division or subdivision affected, with a majority of the ballots cast to decide the issue. . . .

The committee may, when authorized to do so, make and enter into contracts of agreement not inconsistent with the law and policy of the Brotherhood, with the railroad or bus line, the employes of which it represents, concerning rates of pay and working conditions; provided, however, that a standard rule will not be altered or amended without the permission of the President of the Brotherhood, and provided further, it is hereby declared that yard work and road work are two separate and distinct classes of service and the President of the Brotherhood, general committees and officers assigned to assist such general committees under the Constitution and General Rules are hereby obligated and instructed to maintain a definite and defined line of demarcation between such yard and road service to the end that employes of one class of service shall not encroach upon the rights of the employes of the other class of service, and this provision shall be mandatory only where the Brotherhood holds the contract for yard and road service. . . .

Duties of Chairman and Secretary of General Grievance Committee.

No. 4. The chairman of a general grievance committee shall preside at the meetings of the committee, act as its executive head, and see that the laws and rules of the Brotherhood are observed.

Consideration of Grievances.

No. 5. Any member considering that he has been unjustly dealt with by his employer, or that he is otherwise aggrieved or is denied compensation for time lost and expenses incurred by sustaining minor personal injuries in line of service, shall make a comprehensive statement of the grievance in writing containing all of the material facts necessary for a clear understanding of the grievance and present or mail the same to the secretary of his lodge for handling at the next regular meeting. The lodge shall then determine by a majority vote of the members present, employes of the division, whether to sustain or reject the grievance. Should the grievance be sustained, the lodge will then authorize either the local chairman or the local grievance committee to lay the matter before the trainmaster, superintendent, or other proper officer, and use every means to effect a satisfactory settlement, and report his or their action and all things pertaining to the case to the lodge. If the result is not satisfactory, it may be referred to the general grievance committee for further action. A member or a lodge may withdraw a grievance placed in the hands of a general grievance committee, provided such action is taken before said grievance has been presented by the general grievance committee to the officer of the company, but not thereafter.

All grievances must be handled by the regular local grievance committee, or by the local chairman if the lodge so directs, before being referred to the general grievance committee for adjustment. Grievances pertaining solely to members employed on a particular road or division or bus line shall be disposed of by a majority vote of the members of the lodge who are employed on such road or division or bus line; provided, that at least five such members must be present to take action upon such grievance. On small

systems where the office of general chairman is maintained, upon the request of all lodges on such systems, the President of the Brotherhood may issue dispensation permitting the general chairman to handle local grievances. Nothing in this rule shall be construed to prohibit a local lodge from submitting direct to state or national legislative boards matters involving violation of state or federal laws.

Failure of Local Committee to Adjust.

No. 8. When the local chairman or grievance committee fails satisfactorily to adjust any grievance referred to it, as provided in the foregoing rules, and if the lodge so orders it, the secretary of the lodge shall immediately send a certified copy of the grievance to the chairman of the general grievance committee, provided however, that if a time limit is involved the secretary shall forward such certified copy of said grievance to the chairman of the general committee, reporting his action at the next meeting of the subordinate lodge. It shall be the duty of the chairman of the general grievance committee, on receipt of certified copy of grievance, to appoint a time for the consideration of the grievance, and to summon the secretary of the general grievance committee and if requested by the member and approved by the lodge, the chairman of the local grievance committee of the lodge where the grievance exists, to meet with him at an appointed time, in the city where the headquarters of the general superintendent or the general manager of the railroad or bus line, for that part of the system on which the grievance exists, is located. Expenses of the local chairman in such cases, shall be borne by the general grievance committee. A committee thus constituted shall have power to alter, amend, add to or strike out or with the approval of the President refer

to the Legislative Department of the Brotherhood any part or all of any complaint or claim submitted to the committee, subject to appeal to the entire general committee and/or Board of Appeals. A general grievance committee may authorize their chairman to handle all grievances received from local lodges with the management for settlement, failing in this, he will so report to the secretary of the general grievance committee and the chairman of the local lodge where the grievance exists to determine further handling.

Action of General Committee.

No. 10. The general grievance committee, as thus constituted shall have all the rights and powers of the full general grievance committee of the system in the consideration of the pending grievance. If the grievance is approved, the committee shall present it to the general officers of the company and use every honorable means to adjust the same; failing in this, they shall report to lodge where grievances exist to determine further handling; they may summon the President of the Brotherhood to their assistance. Cases closed out involving compensation will be held in abeyance until such time as the secretary of the lodge where grievance originated is notified and given an opportunity to appeal, if so desired.

President Shall Meet General Committee.

No. 12. When the President of the Brotherhood receives such request, he shall, in preference to all other business, except while in attendance at sessions of the Grand Lodge, meet (or deputize an officer of the Grand Lodge to act for him) with the general grievance committee and renew all honorable methods to effect an amicable and satisfactory adjustment of the grievances. Failing in this, the matter

will be referred to the full general grievance committee, with a concise statement of the entire controversy, together with the result of their attempt to adjust the controversy with the managing officers of the property, and if two-thirds or more of the members of the general grievance committee vote in favor of withdrawing from the service rather than continue under the conditions specified by the company, the President of the Brotherhood and the general grievance committee shall have authority to sanction a strike, that is, to approve of a concerted and peaceable withdrawal from the service of all members of the Brotherhood employed in train, yard or bus service on the system or part thereof affected; provided, however, nothing in this rule shall prohibit the circulation of a referendum strike ballot when it appears that the best interests of the membership would not be jeopardized by the delay incident thereto.

Failure to Abide by Decision of General Committee—Penalty.

No. 13. Whatever action may be taken by the general grievance committee of any system within the meaning of the above General Rules shall be law to the lodges on that road or bus line until and unless reversed by the Board of Appeals.

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SUPREME COURT, U. S.

No. 794

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *Petitioner,*

v.

BROTHERHOOD OF RAILROAD TRAINMEN and R. E. CARROLL, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR RESPONDENTS

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---

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 367 F.2d 137, and is reproduced in the record (R. 149-152). The judgment of the District Court is not reported but is reproduced in the record (R. 62). The

Findings of Fact and Conclusions of Law upon which the judgment of the District Court was based are not reported but are reproduced in the record (R. 57-61).

JURISDICTION

The judgment of the Court of Appeals was entered on September 21, 1966 (R. 152-153). The petition for certiorari was filed on November 23, 1966, and was granted on January 9, 1967. The jurisdiction of this Court rests on Section 1254(1) of Title 28 of the United States Code (28 U.S.C., Section 1254(1)).

QUESTIONS PRESENTED

In the opinion of respondents, the following questions are presented:

1. Did the Court of Appeals properly determine that the Brotherhood of Railroad Trainmen (BRT), an unincorporated association whose headquarters are located in Cleveland, Ohio, as provided by its constitution, and which does not maintain any office in Colorado but has members located in that State, was not a resident of the judicial district of Colorado within the meaning of Title 28, Section 1391(b) of the United States Code, so that such judicial district was not the proper forum for a suit against the BRT under the Federal venue statute?

2. Did the Court of Appeals err in holding that there was no basis for liability against an individual for alleged damages to a railroad growing out of a strike based upon the Court's findings that the individual was chairman of a grievance committee of local union lodges on the property of the plaintiff carrier and that his only role in connection with the strike was to send to

the carrier notice of the strike decision by the national union and to thereafter advise the local unions of the issuance of a Federal court restraining order?

STATUTE INVOLVED

This case involves the provisions of Title 28, Section 1391 of the United States Code (28 U.S.C.A., Section 1391). These provisions are quoted in full in Appendix "A" hereto.

STATEMENT

The Denver and Rio Grande Western Railroad Company (D&RGW) asks this Court to reverse a judgment of the Court of Appeals which, in turn, reversed a judgment of the District Court awarding damages in the sum of $37,988.37 to the railroad against respondents BRT and R. E. Carroll, arising out of a brief strike conducted against the railroad by the BRT on May 16, 1960 (R. 57-62).

The strike in question was provoked by two violations by the D&RGW of collective bargaining agreements between the railroad and the BRT. These violations resulted in monetary claims by the affected railroad employees which were processed on the property of the carrier and before the National Railroad Adjustment Board in accordance with the provisions of Section 3, First, of the Railway Labor Act (45 U.S.C.A., Section 153). The actions of the Board are identified as Award No. 19372, dated December 17, 1959, and Award No. 19389, dated January 20, 1960.[1] In both of these cases the Adjustment Board sustained the

[1] These awards appear in the Printed Reports of the First Division of the National Railroad Adjustment Board, Volume 1, at pages 665 and 858.

claims and issued orders to the railroad to comply therewith. In the case of Award No. 19389, the railroad discontinued the illegal practice but refused to pay the employees' claim. In the case of Award No. 19372, the railroad refused both to honor the contract interpretation and to pay the claims.[2]

Thereafter, the BRT conducted a strike against the D&RGW on May 16, 1960, because of its refusal to honor the awards (R. 59). The railroad immediately sought and obtained an ex parte restraining order which was served at about 6:30 p.m. the same day on respondent R. E. Carroll, General Chairman of the Grievance Committee of BRT members on the railroad (R. 59). Mr. Carroll immediately began contacting local groups by telephone and telegram to call off the strike. It ceased in the Denver area about 8:30 p.m. and in the Salt Lake City area about 10:00 p.m. (R. 59). Thereafter, the BRT did not renew the strike or threaten to do so (R. 76).

The restraining order continued in effect by agreement of the BRT and the D&RGW until the District Court acted upon the railroad's motion for a preliminary injunction (R. 59). The District Court granted this motion on June 2, 1960, and thereafter on July 27, 1960, issued a permanent injunction based on the ground that the BRT could not strike to enforce an award of the National Railroad Adjustment Board. *Denver & R. G. W. R. Co.* v. *Brotherhood of Railroad*

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[2] The refusal of the D&RGW to accept the decision of the Adjustment Board with respect to the interpretation and application of the collective bargaining agreement involved in Award No. 19372 was not legally justified and was itself a violation of the provisions of Section 3, First, of the Railway Labor Act. *Gunther* v. *San Diego & Arizona Eastern Ry. Co.*, 382 U.S. 257.

Trainmen, et al., 185 F. Supp. 369 (1960).[3] This decision was subsequently affirmed by the Court of Appeals for the Tenth Circuit. *Brotherhood of Railroad Trainmen et al.* v. *Denver & R. G. W. R. Co.*, 290 F.2d 266 (1961), *cert. den.* 366 U.S. 966.[4]

The BRT and the individual employees involved then filed suit in the District Court to enforce the awards pursuant to the provisions of Section 3 of the Railway Labor Act. In each case, the District Court affirmed the determination of the Adjustment Board that the D&RGW had by its actions violated the collective bargaining agreements, but reduced the amount of the awards to a nominal sum through the application of common law contract principles.[5]

The Court of Appeals affirmed the judgment of the District Court with respect to Award No. 19372 (*Brotherhood of Railroad Trainmen, et al.* v. *Denver & R. G. W. R. Co.*, 338 F.2d 407, *cert. den.* 380 U.S. 972) on cross-appeals of the parties. The Court of Appeals reversed the judgment of the District Court with respect to Award No. 19389 on December 28, 1966, and

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[3] R. 59-60.

[4] At the time of the strike, no Federal court had held that a strike under the circumstances involved was prohibited by the Railway Labor Act. It was not until 1963 that this Court for the first time ruled on the right of a railway labor organization to conduct a strike under such circumstances. *Brotherhood of Locomotive Engineers* v. *Louisville & Nashville R. Co.*, 373 U.S. 33.

[5] *Cf.* this Court's statement in its recent decision in *Transportation-Communication Employees Union* v. *Union Pacific R. Co.*, — U.S. —, 17 L. Ed. 2d 264, decided December 5, 1966, to the effect that a collective bargaining agreement "is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts".

this action is now the subject of a petition to this Court for a writ of certiorari filed on March 13, 1967 (Case No. 1141).

The damage claims of the D&RGW were originally filed as counterclaims to petitions to enforce the Adjustment Board awards. They were dismissed by the District Court on the ground that they were not proper counterclaims under Section 3, First (p), of the Railway Labor Act. *Brotherhood of Railroad Trainmen, et al.* v. *Denver & R. G. W. R. Co.*, 31 F.R.D. 297 (1962). Thereafter, the railroad filed a separate action in the District Court asking damages from the BRT for alleged injuries suffered as a result of the strike of May 16, 1960 (R. 1-4). The BRT filed a motion to dismiss the action on the grounds of improper venue or in lieu thereof to quash the return of service (R. 4). The D&RGW then filed an amended complaint in which respondent R. E. Carroll and the chairmen of the BRT local lodges on the property of the railroad were added as parties defendant (R. 7-10). The BRT and the individual defendants responded with a motion to strike or dismiss the amended complaint on various grounds, including (1) that it did not set forth a cause of action against respondent Carroll or the local chairmen named therein, and (2) that the complaint could not properly be brought in the District Court for the District of Colorado under Title 28, Section 1391 of the United States Code (R. 10).

This motion was supported by an affidavit of the Acting General Secretary-Treasurer of the BRT which set forth that the headquarters of the BRT are located in Cleveland, Ohio, in accordance with the provisions of Section 3 of the Constitution of the BRT, and that the BRT does not maintain any office in Denver, Colorado. This affidavit also set forth that Mr. R. E. Carroll

was elected to his office as Chairman of the General Grievance Committee of employees of the D&RGW represented by the BRT by the chairmen of grievance committees of various local lodges of the BRT having members employed on the D&RGW (R. 11-12). The D&RGW did not file any counter affidavits. There were not before the District Court any further facts as alleged on page 10 of the brief of petitioner nor any of the material quoted in Appendix B to petitioner's brief.

The District Court denied the motion of the BRT, et al., without comment (R. 12). The statements in the brief of petitioner as to what the District Court "necessarily concluded" by its action are mere assumptions not supported by the record.[6]

When the D&RGW complaint came on for trial befor the District Court, the railroad did not allege that it had suffered any damage during the eight-hour period of the strike. All passenger and freight trains scheduled to operate on May 16, 1960, did, in fact, operate although some were delayed (R. 18, 60). The only damage claimed by the D&RGW was alleged loss of revenue to the carrier for shipments claimed to have been diverted by shippers during the period May 19, 1960, to June 1, 1960, when the BRT was enjoined from striking and there was no threat of a strike (R. 19-21, 25, 55, 60).

After trial, the District Court dismissed the action against the chairmen of the local lodges of the BRT on

[6] This is particularly true of the statement at page 10 of petitioner's brief that virtually all of the represented employees work and live in the judicial district of Colorado. There are no facts of record on this point.

the grounds that there was no mention made during the trial of such individuals (R. 60, 62). The District Court awarded damages based upon a finding that the Ford Motor Company and its suppliers diverted shipments from the D&RGW during the period after the strike ended (May 19, 1960—June 1, 1960) and that such diversion was proximately caused by the existing threat of a strike and the failure to secure an injunction against such strike (R. 59-62). The judgment ran against both the BRT and Mr. R. E. Carroll, although the District Court's Findings of Fact did not include any finding that Mr. Carroll was responsible for the strike (R. 57-62).

The BRT and Mr. Carroll appealed the judgment (R. 63). This appeal was based upon the grounds, among others, (1) that the District Court erred in denying the motion of the BRT, et al., to dismiss the complaint for improper venue, and (2) that the District Court erred in awarding damages against Mr. R. E. Carroll.[7] Upon consideration of the appeal, the Court of Appeals reversed the District Court (R. 152). The Court of Appeals held that the BRT is not a resident of the judicial district of Colorado, as required by Title 28, Section 1391(b) of the United States Code and con-

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[7] The appeal also raised the questions of (a) whether or not the D&RGW was entitled to recover damages from the BRT and Mr. Carroll because the strike was provoked at least in part by the action of the carrier in violating the Railway Labor Act by its refusal to accept the interpretation of the collective bargaining agreement set forth in Award No. 19372; (b) whether the D&RGW was entitled to damages for the threat of a future strike which, if it existed at all, was the threat of a lawful strike which could have been conducted only if authorized by the Federal courts; and (c) whether the evidence supported the damage award (R. 63-68).

sequently the complaint should have been dismissed as to it (R. 149-152). The Court of Appeals also held that the District Court erred in awarding damages against Mr. R. E. Carroll because the record showed that his role in connection with the strike was limited to sending the notice of the BRT strike decision to the D&RGW (R. 152).

The D&RGW asks this Court to reverse the decision of the Court of Appeals (Pet. Br., 41).

SUMMARY OF ARGUMENT

I

The petitioner D&RGW, supported by the railroad *amicus curiae* National Railway Labor Conference, argues that Section 1391(c) of Title 28 of the United States Code, which provides that any judicial district in which a corporation is incorporated or licensed to do business or is doing business shall be regarded as the residence of the corporation for venue purposes, should be read as also defining the residence of an unincorporated labor association, such as the BRT, for purposes of venue in non-diversity actions brought under Section 1391(b) of Title 28. The railroads agree that Section 1391(c) does not by its language include unincorporated associations. However, they argue that this is a necessary implication to be derived from the history of the venue statute and that in any event such an interpretation is required by the practicalities of litigation.

The argument that the interpretation urged by the railroads is a necessary implication from the history of the venue statute is based upon the erroneous premise that prior to the 1948 revisions of the general Federal venue statute the requirements of venue for corpora-

tions and unincorporated associations were identical. However, this was not the case prior to the 1948 revisions. A corporation in a non-diversity action could be sued only in the state of incorporation, regardless of where its principal place of business was located, and an unincorporated association could be sued only in the judicial district in which its principal place of business or headquarters were located. The railroads' argument is predicated upon dictum in the case of *Sperry Products* v. *Association of American Railroads,* 132 F.2d 408 (2nd Cir., 1942), to the effect that both corporations and unincorporated associations have a "presence" in states in which they are operating or doing business. However, such presence was not sufficient for venue and was so recognized in the *Sperry* case. Moreover, the adoption by Congress of the 1948 revisions broadening the venue provisions with respect to corporations, while making no changes in the existing rule as to unincorporated associations, argues very strongly for an intent by the Congress to differentiate between the two entities with respect to venue.

The further argument that the interpretation urged by the railroads is necessary for practical reasons of litigation amounts to nothing more than a bald assertion that this Court should change the language of a statute adopted by Congress for reasons which should be addressed to the Congress. The argument relies upon the decision in *Rutland Railway Corp* v. *Brotherhood of Locomotive Engineers,* 307 F.2d 21, *cert. den.* 372 U.S. 954, in which the Second Circuit clearly engaged in outright legislation. Not only is such a procedure in the interpretation of statutes contrary to all recognized rules of statutory construction while also doing violence to the basic theory of the separation of

powers within the Federal government, but the specific practical reasons assigned for such action have been rejected by this Court. In *United Steelworkers* v. *Bouligny,* 382 U.S. 145, a union made the same identical argument that there were no longer practical differences between a union and a corporation and consequently Section 1332 of Title 28 of the United States Code should be interpreted to give a union the same citizenship for purposes of diversity as a corporation. This Court rejected the argument on the grounds that it was a request to the Court to legislate and that the argument should be addressed to the Congress. The fact that this universal principle was set forth in a case involving the interpretation of Section 1332 of Title 28 while the present case involves the interpretation of Section 1391 does not affect the validity of the principle.

Finally, there is no merit to the practicality arguments advanced by the railroads. The claim that it is necessary to be able to sue a national union in any judicial district in which it has members in order to enjoin illegal strikes is completely refuted by the actual practice of the railroads in such situations, including the case of the strike which gave rise to the present litigation. In these cases, speed in stopping the strike is of the essence and this can be achieved only by suing and serving the responsible local officials of the union as was done in the present case. Nor is there any validity to the argument that the convenience of the parties is better served by permitting the national union to be sued under the Federal venue statute in any judicial district in which it has members. The present case is the clearest refutation of such an argument. Counsel for the railroad, the principal witnesses for the

railroad, and the documents supporting the principal evidence of the railroad were all located more than 1,000 miles from the judicial district of Colorado in which the suit was brought. It is apparent that the arguments of the railroads are designed to produce a rule of law which would permit them to choose their own Federal forum for suing a national union such as the BRT while at the same time the BRT has a limited number of forums for a suit against a carrier far removed from its home base.

II

The petitioner D&RGW argues that the Court of Appeals erred in directing the dismissal of the action against respondent R. E. Carroll, Chairman of the General Grievance Committee of employees represented by the BRT on the property of the railroad. The Court of Appeals found that Mr. Carroll was not an officer of the BRT, was not responsible for the calling of the strike, and that his only connection with the strike was to send to the carrier a notice that the BRT had made the decision to conduct the strike. The Court of Appeals concluded that Mr. Carroll had no more responsibility for the strike than did the local officers of local units of the BRT with respect to whom the action was dismissed for lack of evidence. The D&RGW contends that Mr. Carroll was not only an officer of the BRT but was a governing officer of the organization with joint responsibility for calling and conducting the strike. The carrier's argument is wholly unsupported by the record, which fully supports the findings and conclusions of the Court of Appeals. The D&RGW argument is based in large part upon matters which are not of record in the case and which were not the subject of evidence to determine their relevancy to the calling and conduct of the strike. The only matters of record cited

by the D&RGW are not matters which establish the responsibility of Mr. Carroll for either the calling or the conduct of the strike.

ARGUMENT

I.

The Court of Appeals Correctly Held that the Action Could Not Be Brought Against the BRT in the Judicial District of Colorado Under the Venue Requirements of Section 1391(b) of Title 28 of the United States Code

The amended complaint in this case named as defendants the BRT, seven individuals who are chairmen of grievance committees of local lodges of the BRT, and Mr. R. E. Carroll, General Chairman of the Grievance Committee of BRT members on the property of the D&RGW (R. 7-10). The amended complaint rested on the grounds that the brief strike of May 16, 1960, in support of an Adjustment Board award was prohibited by the provisions of the Railway Labor Act.[8] Thus, as the D&RGW and the *amicus* National Railway Labor Conference agree (D&RGW Br. 2; Conference Br. 10), the amended complaint was subject to the venue requirements of Title 28, Section 1391(b) of the United States Code, which read as follows at the time of the Court of Appeals decision:[9]

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[8] Count II of the complaint alleged a common law conspiracy. However, no such conspiracy could exist unless the strike was prohibited by the Railway Labor Act and the District Court did not find any conspiracy (R. 57-62).

[9] No argument is made that Section 301(c) of the Labor-Management Relations Act (29 U.S.C.A., Section 185(c)) is applicable. Assuming *arguendo* that this Section applies to other than suits based on violations of contracts, it does not apply to actions arising under the Railway Labor Act. *Local Union No. 25 of International Brotherhood of Teamsters* v. *New York, New Haven and Hartford R. Co.*, 350 U.S. 155 (1956).

> "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

Section 1391(b) was amended on November 2, 1966, by Public Law 89-714, after the Court of Appeals decision, to also authorize civil non-diversity actions in a judicial district "in which the claim arose". The D&RGW and the Railway Labor Conference refer to this amendment only in passing in footnotes (D&RGW Br. 20, footnote 1; Conference Br. 3, footnote 2) and neither suggests that the amendment is either applicable or, if applicable, determinative of the present case. Both proceed on the assumption that Section 1391(b) as it read prior to November 2, 1966, controls the present case. Neither brief suggests that the amendment may be applicable to the present case under the principle of *United States* v. *Alabama,* 362 U.S. 602.[10] It is the position of the BRT that venue did not lie for this action in the judicial district of Colorado under Section 1391(b) either as it read at the time of the Court of Appeals decision or after the amendment of November 2, 1966, because the BRT is neither a "resident" of the judicial district of Colorado within the meaning of that Section nor did the claim of the D&RGW arise within that judicial district within the meaning of the amended Section.

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[10] The pending D&RGW petition for certiorari in Case No. 1141 argues against the decision of the United States Court of Appeals applying to a National Railroad Adjustment Board award the amendment of June 20, 1966, to the Railway Labor Act (Public Law 89-456) which became effective while the suit to enforce the award was before the Court of Appeals. The BRT in its brief in opposition to the petition argues in support of this decision and application of the statute.

Assuming that the amendment is applicable to the present case, the record does not permit a determination to be made that the D&RGW claim arose in the judicial district of Colorado.

The decision to conduct a strike was made by the President of BRT in Cleveland, Ohio (R. 148), so that a D&RGW claim that such strike violated the Railway Labor Act arose in Ohio. *Lodge No. 42 of the International Brotherhood of Boilermakers, Etc.* v. *International Brotherhood of Boilermakers, Etc.*, 324 F. 2d 201 (6th Cir., 1963), *cert. den.* 376 U.S. 913; *Coleman* v. *Brotherhood of Railway and Steamship Clerks*, 228 F. Supp. 276 (D.C. N.York, 1964); cf. *George* v. *Bricklayers, Masons and Plasterers International Union*, 255 F. Supp. 239 (D.C. Wisc., 1966).

Moreover, a part of the strike and a resulting part of the carrier's loss and damage claim occurred only in Utah where a portion of the diversion took place (R. 20, 59). Thus, the D&RGW cannot assert that its entire claim arose in Colorado. It can only put its claim into a single package for venue purposes by suing the BRT where it "resides".

The undisputed facts pertinent to the residence of BRT are that the BRT is an unincorporated labor organization whose headquarters are maintained in Cleveland, Ohio, as provided in Section 3 of its Constitution, and which does not maintain any office in the judicial district of Colorado. The only connection of the BRT with the judicial district of Colorado is that there are organized within the district local lodges of BRT with members employed by the D&RGW (R. 5-6, 11-12).

The Court of Appeals held that venue for the action was governed by Section 1391(b) of Title 28 of the

United States Code; that Section 1391(c) was not applicable to unincorporated associations; that the BRT did not reside within the judicial district of Colorado as required by Section 1391(b); and that, therefore, the action did not meet the venue requirements of Section 1391 (R. 150-152). It is respectfully submitted that this decision is in accord with the language and structure of the statute, its legislative history, and recognized rules of statutory construction. It is also submitted that the arguments of the petitioner D&RGW and the *amcus curiae* National Railway Labor Conference constitute purely legislative reasons for applying Section 1391(c) to unincorporated labor organizations contrary to the plain and unambiguous language of that Section and are reasons which should be directed to the Congress and not to the courts and are, in fact, not sound.

A. The language of the statute clearly supports the Court of Appeals decision

An unincorporated association such as the BRT may be sued in a Federal district court to enforce a Federal right as in this case as a jural entity. *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344; Rule 17(b) of the Federal Rules of Civil Procedure. Prior to the revision of the United States Code, adopted June 25, 1948, the venue requirements for Federal courts generally were set forth in Section 112 of Title 28 of the United States Code, which provided in pertinent part that "no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant . . ." This requirement had remained unchanged since the Judiciary Acts of 1887 (24 Stat.

552) and 1888 (25 Stat. 443).[11] Under the "inhabitant" requirement, a corporation was an inhabitant only of the State of its incorporation and could not be sued elsewhere. *Suttle* v. *Reich Bros. Construction Co.*, 333 U.S. 163 (1948). An unincorporated association was regarded as an "inhabitant" only of the judicial district in which was located its principal place of business. *Sperry Products* v. *Association of American Railroads*, 132 F. 2d 408 (2nd Cir., 1942); *Brotherhood of Locomotive Firemen & Enginemen* v. *Graham*, 175 F. 2d 802 (D.C. Cir., 1948). The D&RGW has recognized this application of the statute both in its petition for a writ of certiorari and in its brief. In its reply to BRT's brief in opposition to the petition for certiorari, the railroad stated that (Br. 4) "it was necessary at that time [i.e. 1947] to provide specifically for actions against unincorporated associations in districts in which they were doing business, if the associations did not maintain their principal places of business therein". In its brief, the D&RGW has set forth the same application of the venue statute prior to 1948 (Br. 7, 8, 13).

This Court did not rule on the meaning of "inhabitant" as applied to an unincorporated association in Section 112. In *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232 (1949), the Court held that there was venue for an action against a railway labor organization in the District of Columbia under the District of Columbia venue statute permitting suits against a defendant "found" within the District. With respect to the holding of the District of

[11] Prior to that time and dating from the Judiciary Act of 1789, general Federal venue depended upon (1) residence, or (2) where the defendant could be found.

Columbia Circuit Court of Appeals that the unincorporated association was not an "inhabitant" of the District of Columbia within the meaning of Section 112, this Court stated as follows: (pages 235, 236)

> "This cause of action is founded on federal law, and the venue provision generally applicable to federal courts at the time this action was commenced required such actions to be brought in the district whereof defendant 'is an inhabitant.' 28 USCA § 112. Effective September 1, 1948, this provision was modified to require that such actions be brought 'only in the judicial district where all defendants reside, except as otherwise provided by law.' 28 USC (Supp II), § 1391(b). It was assumed in the courts below, and since it involves a question of fact we do not stop to inquire as to whether they were correct in so doing, that if this general federal venue statute is the sole authority for bringing this case in the District of Columbia, the venue could not be supported, as this defendant claims neither to reside in nor to inhabit the District."

It should be observed that this Court stated that the question was one of fact and not one of whether the phrase "inhabitant" meant other than the principal place of business of an unincorporated association.

When the United States Code was revised in 1948, the provisions of Section 112 of Title 28 were incorporated into Section 1391(b) of Title 28 of the revised Code with respect to non-diversity suits and the venue requirement was changed from one of the judicial district of which the defendant was an "inhabitant" to the judicial district where the defendant or all defendants reside. The Reviser's Notes attached to the Report of the Committee of the Judiciary of the House of Representatives on the proposed legislation, dated April 27,

1947, showed that this change was one for purposes of clarity only and that the intent of the legislature was that the term "inhabitant" and the term "resident" were accepted as synonymous.[12] This Note reads as follows:

> "Word 'reside' was substituted for 'whereof he is an inhabitant' for clarity inasmuch as 'inhabitant' and 'resident' are synonymous. (See Ex parte Shaw, 1892, 12 S.Ct. 935, 145 U.S. 444, 36 L.Ed. 768; Standard Stoker Co., Inc. v. Lower, D.C., 1931, 36 F.2d 678; Edgewater Realty Co. v. Tennessee Coal, Iron & Railroad Co., D.C., 1943, 49 F.Supp. 807."

It would appear clear that under the revised Federal venue statute of 1948 a non-diversity action against an unincorporated association could be brought only within the judicial district where it has its principal place of business. This obvious conclusion is set forth in Volume 1 of Moore's "Federal Practice", page 1483, as follows:

> "When an unincorporated association or partnership sues or is sued as an entity, it is a resident where it has its principal place of business. . ."

However, the D&RGW contends that the provisions of Section 1391(c) of Title 28 of the United States Code changed the rule prevailing prior thereto and that under these provisions an unincorporated association may be sued in any judicial district in which it is "doing business", i.e. in which it has members which it represents. Section 1391(c) reads as follows:

> "A corporation may be sued in any judicial district in which it is incorporated or licensed to do

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[12] House Report No. 308, accompanying H.R. 3214 of First Session of 80th Cong., April 27, 1947.

> business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

There can be no question but that Section 1391(c) broadened the general Federal venue requirements under which a corporation could previously be sued only in a state of its incorporation so that it can now be sued also where it is licensed to do business or is doing business. *Pure Oil Company* v. *Suarez,* 384 U.S. 202 (1966). In that case, this Court stated as follows with respect to the effect of Section 1391(c): (page 204)

> "The effect of § 1391(c) was to broaden the general venue requirements in actions against corporations by providing a forum in any judicial district in which the corporate defendant 'is doing business.' See Moore, Commentary on the Judicial Code 193-194 (1949); 1 Barron and Holtzoff, Federal Practice and Procedure, § 80, at 386 (Wright rev. 1960). It seems manifest that this change was made in order to bring venue law in tune with modern concepts of corporate operations."

Section 1391(c) is, however, by its specific terms limited to corporations. Its language is clear and unambiguous and by recognized rules of statutory construction is not subject to a broadening by interpretation to include unincorporated associations. *Flora* v. *United States,* 362 U.S. 145; *C-O-Two Fire Equipment Co.* v. *Barnes,* 194 F. 2d 410 (7th Cir., 1952), *cert. den.* 343 U.S. 925, aff'd 344 U.S. 861. In the latter case, the Seventh Circuit spoke as follows with respect to Section 1391(c): (page 413)

> "We agree with the intervenor's contention that the phraseology of Sec. 1391(c) is clear, plain and

unambiguous and is not susceptible to interpretation or construction."

The construction urged by the D&RGW would, therefore, add language to Section 1391(c) which is simply not there.

B. There is no legislative history or other materials to support a revision through interpretation of the statutory language

Although their argument does clear violence to the statutory language, both the D&RGW and the National Railway Labor Conference contend that the reading of Section 1391(c) so as to include unincorporated associations is a necessary implication. This argument is based upon the premises that prior to the 1948 revisions of the Judicial Code the prevailing authority held that an unincorporated association was subject to the same venue requirements as those applicable to a corporation and that, therefore, when Congress revised the general venue provisions in 1948, it did so in the light of this prevailing authority and must have intended to include unincorporated associations within the scope of Section 1391(c) although the language is limited to corporations. It is respectfully submitted that this argument will not stand analysis.

It should be first observed that the premise of the argument, i.e. that prior to the 1948 revisions the prevailing authority held that an unincorporated association was subject to the same venue requirements as those applicable to corporations, is incorrect. The argument is based upon the language in the decision in *Sperry Products* v. *Association of American Railroads,* 132 F. 2d 408 (2nd Cir., 1942), comparing unincorporated associations to corporations and arriving at the conclusion that both have a "presence" in states other

than their state of incorporation or the state in which their principal office is located. However, that case recognizes that mere "presence" was not enough to establish that either a corporation or an unincorporated association was an "inhabitant" of a particular judicial district and, in fact, held that an unincorporated association was an "inhabitant" for venue purposes only of the judicial district in which was located its principal place of business. In contrast, the place of habitation of a corporation for venue purposes prior to 1948 was the state of incorporation which was not necessarily the location of the corporation's principal place of business. *Suttle* v. *Reich Bros. Construction Co.*, 333 U.S. 163 (1948).

Moreover, assuming *arguendo* that the premise of the argument is correct, the conclusion of the carrier is not a necessary or even a logical implication. The requirements for interpretation by implication are as follows: (*United States* v. *Jones*, 204 F. 2d 745 at 754, *cert. den.* 346 U.S. 854)

> "Necessary implication refers to a logical necessity; it means that no other interpretation is permitted by the words of the Acts construed; and so has been defined as an implication which results from so strong a probability of intention that an intention contrary to that imputed cannot be supported. 42 C.J.S., page 405 and cases there cited. The term is used where the intention with regard to the subject matter may not be manifested by explicit and direct words, but is gathered by implication or necessary deduction from the circumstances and the general language."

Obviously, the implication which the D&RGW seeks to read into Section 1391(c) is not a logical necessity or

one that results from so strong a probability of intention that a contrary contention cannot be supported. Indeed, given the railroad premise that venue requirements as to corporations and unincorporated associations were the same prior to the 1948 revisions, the logical implication to be derived from those revisions is that Congress intended by limiting the language of Section 1391(c) to change venue requirements as to corporations without making a change with respect to unincorporated associations.

The D&RGW suggests (Br. 15) that the action of Congress in authorizing suits under Section 301 of the Labor-Management Relations Act of 1947 (29 U.S.C.A., Section 185) to be brought against a labor organization in any district in which it is engaged in representing or acting for employee members supports the carrier's construction of Section 1391(c). However, the fact that Congress recognized the need to make such a specific provision for Section 301 suits and its failure to make any similar provision at all in Section 1391(c) argues for a contrary conclusion. Since prior to the enactment of Section 1391(c) a labor organization could be sued under the general venue statute only in the judicial district of its principal place of business or headquarters, it is only logical that if Congress had intended to broaden this in the 1948 revisions it would have specifically done so as it did in the enactment of Section 301 of Title 29.

The D&RGW also argues (Br. 16, 35, 36) that the decision in *Pure Oil Company* v. *Suarez,* 384 U.S. 202, supports its construction of Section 1391(c). However, that case did not by interpretation broaden Section 1391(c) and insert therein provisions not found in the Section, as the carrier now proposes, but simply

stated that the definition therein of a residence was applicable to the definition of a residence of a corporation under the Jones Act. In other words, this Court found that the Jones Act did not intend to change the definition of a residence of a corporation. In contrast, the carrier is here trying to use the definition of a corporation to define the residence of an unincorporated association.

C. The statutory interpretation urged by petitioner can be made only by outright legislation in violation of recognized rules of statutory construction

The erroneous nature of the implication argument of the railroads is demonstrated by reference to the decision in *Rutland Railway Corp.* v. *Brotherhood of Locomotive Engineers,* 307 F. 2d 21 (2nd Cir., 1962), *cert. den.* 372 U.S. 954, upon which they rely. The Second Circuit in that case made no effort to read unincorporated associations into Section 1391(c) by implication. It simply seized the bull by the horns and legislated for purely legislative reasons. It recognized in the following statement that to include unincorporated associations within Section 1391(c) would be to read words into the Section which simply are not there: (page 29)[13]

> "It is true that we would be reading into 28 U.S.C. § 1391(c) words which are not there if we should

[13] The Second Circuit also recognized that the reading of "unincorporated associations" into Section 1391(c) created difficulties within the rule of statutory construction expressed in the phrase "expressio unius est exclusio alterius", but disregarded the problem by the unsupported statement that it did not find any manifestation of a Congressional policy of excluding unincorporated associations from Section 1391(c). The exclusion lies, of course, in the clear language which renders unnecessary any such interpretative explanation.

assert that that subsection states that it applies to unincorporated associations."

The Court goes on then, however, to do precisely that upon the grounds of "the practical requirements of litigation". This rationale for its holding reads as follows: (page 29)

> ". . . we follow the reasoning in Sperry Prods. and assimilate the residence of unincorporated associations under 28 U.S.C. § 1391(b) to that of corporations, 28 U.S.C. § 1391(c). Since the residence of a corporation for venue purposes has been expanded to include all the judicial districts in which the corporation is doing business, the residence of an unincorporated association for venue purposes should likewise be expanded to include all the judicial districts in which the unincorporated entity is doing business. We believe this accords with the practical requirements of litigation involving unincorporated associations."

It thus repudiates all of the recognized principles of statutory construction and assigns a pure legislative reason to broaden Section 1391(c) and insert into that Section language which it concedes is not there. Both the D&RGW and the *amicus* supporting the railroad ask this Court to engage in the same legislative process and support their arguments for such action entirely by reasons which should be addressed to Congress and not to the courts. This is precisely what this Court refused to do in *United Steelworkers of America* v. *Bouligny,* 382 U.S. 145 (1965). In that case, the Steelworkers requested that this Court determine the union's citizenship for the application of Section 1332 upon the basis of legislative reasons favorable to the union and which included the precise reason relied upon in the

Rutland case, i.e. that the distinction between corporations and unincorporated associations such as labor associations has become artificial and unreal. This Court rejected such reason as a basis for action, finding that the argument "however appealing" was addressed to an inappropriate forum and ought to be made to Congress and not to the courts. The pertinent portions of this Court's findings read as follows: (pages 149-151)

> "In recent years courts and commentators have reflected dissatisfaction with the rule of Chapman v. Barney. The distinction between the 'personality' and 'citizenship' of corporations and that of labor unions and other unincorporated associations, it is increasingly argued, has become artificial and unreal. The mere fact that a corporation is endowed with a birth certificate is, they say, of no consequence. In truth and in fact, they point out, many voluntary associations and labor unions are indistinguishable from corporations in terms of the reality of function and structure, and to say that the latter are judicial persons and 'citizens' and the former are not is to base a distinction upon an inadequate and irrelevant difference.
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> * * * * *
>
> "We are of the view that these arguments, however appealing, are addressed to an inappropriate forum, and that pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts."

The Court of Appeals correctly held that the decision in the *Bouligny* case constituted "a rejection of the principle espoused by the Rutland case, upon which the Rio Grande relies to sustain venue" (R. 151). The D&RGW argues, however, that the rationale of the

Bouligny case is not applicable to the present case because one involves jurisdiction and the other involves venue (D&RGW Br. 29-32). However, such rationale embraces a universal principle of statutory construction which is not dependent upon the subject matter of the particular case. This principle is that the courts cannot for legislative reasons rewrite statutory provisions and that the arguments for such revisions should be addressed to the Congress and not to the courts. This principle is particularly applicable to the present case for statutory construction since the legislative reasons rejected by this Court in the *Bouligny* case are the identical reasons advanced in the *Rutland* case and by the D&RGW and the National Railway Labor Conference here as a basis for the courts to ignore the clear statutory language and rewrite the statute.

Both the D&RGW and the Railway Labor Conference suggest that there is a difference in that this Court in the *Bouligny* case was simply reaffirming prior determinations with respect to the status of unincorporated associations for diversity purposes while here an affirmance of the Court of Appeals would constitute a rejection of numerous cases and principles which have prevailed for many years with respect to the venue of Federal courts. However, such an assumption of the existing state of the venue decisions is entirely erroneous in the light of numerous decisions, other than the present Court of Appeals decision, which are contrary to the *Rutland* decision, which rely upon the statute itself and not upon extrinsic arguments, and which, contrary to the carrier's assertions, were made after the 1948 revisions to the venue statute. *Brotherhood of Locomotive Firemen & Enginemen* v. *Graham,* 175 F. 2d 802 (D.C. Cir., 1948); *Cherico* v. *Brotherhood of*

Railroad Trainmen, 167 F. Supp. 635 (S.D.N.Y., 1958); *Griffin* v. *Illinois Central R. Co.,* 88 F. Supp. 552 (N.D. Ill., 1949); *McNutt* v. *United Gas Workers,* 108 F. Supp. 871 (W.D. Ark., 1952); *Salvant* v. *Louisville & Nashville R. Co.,* 83 F. Supp. 391 (W.D. Ky., 1949). The *Rutland* decision itself (page 29) recognized and cited these decisions.

The D&RGW also suggests that if the decision in the *Bouligny* case is controlling then the residence of the BRT for venue purposes would be the aggregate residence of its members, not its principal place of business. However, this argument confuses the subject matter of the *Bouligny* case with the principle of statutory construction involved. There is no contention that the BRT cannot be sued as a jural entity for an alleged violation of the Railway Labor Act. Rule 17(b) of the Federal Rules of Civil Procedure specifically recognizes such a suit. The question as presented is whether or not Section 1391(c) of the general venue statute applies to such jural entity to determine its place of residence for venue purposes. The argument that it does is an argument which is clearly labeled by this Court in the *Bouligny* case as an argument to support legislation and not an argument to support statutory construction. The arguments of the railroads constitute an effort to confuse the principle involved. Even if the *Bouligny* case had not existed, this principle would prevent the obvious legislation involved in the *Rutland* decision. The signficance of the *Bouligny* case is that in such decision this Court gave judicial expression to the principle that the courts should not rewrite statutes for legislative reasons and applied that principle to the very reasons which are here advanced for rewriting of the congressional mandate. No amount of argument

can obscure that fact. The statute simply cannot be construed as the railroads want it to be construed except by an act of legislation.

D. The so-called practical arguments urged by the railroads as a basis to revise the statutory language are without merit

The D&RGW argues (Br. 22-29) that the judicial district of Colorado is the most appropriate forum for the present suit because the collective bargaining relationship between the parties, and the process through which the Brotherhood acts to represent the carrier's employees were all Colorado oriented. This phase of the carrier's argument is based entirely upon non-record materials from which conclusions are drawn which have never been tested by direct examination or cross-examination in court. The carrier did not place any facts in the record with respect to the extent to which its relationships with the BRT are carried on within Colorado or evidence with respect to the extent that actions concerning the events involved took place within Colorado. This Court can take judicial notice that the National Mediation Board under whose auspices contract negotiations are held is located in Washington, D. C., and that the National Railroad Adjustment Board which decides grievances and disputes concerning the interpretation and application of contracts is located in Chicago, Illinois. These two facts alone cast doubt on the accuracy of the carrier's non-record arguments.

The National Railway Labor Conference, also largely upon the basis of non-record facts, argues that affirmance of the Court of Appeals would adversely affect railroads by requiring that numerous important suits, particularly suits to enjoin

strikes violating the requirements of the Railway Labor Act, be instituted in inconvenient forums or prosecuted only against local officers of the union and not against the most important potential defendant, the national union itself. This argument, however, will not stand up. In the case of a suit to enjoin a strike, such as the strike of May 16, 1960, which gave rise to the present litigation, the carrier seeks immediate relief and can obtain such immediate relief not by suing the national union, which may not even hear about such a suit for several days, but by suing and serving the local officers. In the present case, the injunction suit to stop the strike, although it did name the BRT, was directed against the local officers and it was these officers who were served with the restraining order and who moved to call off the strike (R. 59). Indeed, the *amicus* Railway Conference brief argues the need to enjoin a General Chairman of a railway labor union, who is described as "the union's most important responsible local official", and who was in fact the individual served with the restraining order to enjoin the strike here involved (Conference Br. 3, footnote 2). It is clear that the only real purpose of the railroads is to subject the national treasury of a national union such as the BRT to damage suits in any forum in which it has members, which in practice means most of the judicial districts of the country, so that the railroad may be in a position to shop for a favorable forum.

The railroads also argue that under the Court of Appeals decision venue would be in a forum having relatively little connection with the controversy, far removed from the railroad and the employees involved, the subject matter of the litigation, the location of witnesses, records and the parties' principal representa-

tives in the dispute. It is argued that such a trial of such a case in such a forum would be excessively expensive and inconvenient. The fallacy of this argument is fully demonstrated by the present case. The suit was brought and prosecuted in the judicial district of Colorado, not by Colorado lawyers for the D&RGW, but by a Chicago law firm located approximately 1000 miles from the forum and these attorneys made the trips back and forth for the trial of the case (R. 3, 10, 69, 149). The principal witness in support of the railroad's claims of diversion of shipments was the Manager of Traffic Analysis of the Ford Motor Company, whose address was Dearborn, Michigan, and who traveled to Denver for the trial (R. 77-102). The carrier also relied upon evidence with respect to shipments from the Ford assembly plant at Milpitas, California (R. 20). The location of the attorneys, the principal witnesses, the records supporting the testimony of the principal witnesses all were far removed from the judicial district of Colorado. In contrast, they were close to the judicial district of Ohio in which the headquarters of the BRT are located. The carrier's cost figures were also based on data on file with the Interstate Commerce Commission in Washington, D. C. One of the principal evidentiary problems in the case was the unavailability of such data in Denver (R. 125). They would have been more available in Cleveland or in Washington, D. C., where the suit could have been brought. It is obvious that the D&RGW chose the forum which it did for reasons other than the convenience of its litigation or to minimize the expense thereof. The choice of the forum substantially increased the inconvenience as well as the expense of the trial.

The arguments of the railroad are simply a thin veneer to disguise support for a rule of law which would in effect permit them to choose their own forum for suing a national union such as the BRT. The BRT cannot sue the D&RGW on the union's home grounds. It must go to Colorado for most purposes or perhaps Salt Lake City to sue the D&RGW. It cannot sue in Cleveland. The same limited forums would be available in suits against other railroads. There is no reason in law, equity, or practically why the D&RGW and other railroads should not come to Cleveland if they want to subject the national treasury of the union to liability. Section 1404 of Title 28, which is discretionary, does not provide such equity as the carrier suggests.

II

The Court of Appeals Correctly Concluded that the District Court Should Have Dismissed the Action Against Mr. R. E. Carroll

The order of the District Court entered judgment in the sum of $37,988.37 in favor of the D&RGW against the BRT and Mr. R. E. Carroll (R. 62). Mr. Carroll appealed the judgment against him (R. 63). The Court of Appeals reversed the judgment against Mr. Carroll with the following finding: (R. 152)

> "The Railroad suggests that even if venue did not exist as to the Brotherhood, the proper procedure would be to drop it from the case and let the judgment stand against Carroll, a Colorado resident. Carroll was Chairman of the General Grievance Committee on the Rio Grande; he was not an officer of the union. So far as the record shows, Carroll's role in connection with the strike was limited to sending the Railroad notice of the Brotherhood's strike decision and thereafter ad-

> vising the local unions of the issuance of the restraining order. Carroll had no more to do with causing the strike than did the chairmen of the locals, and accordingly, he too should have been dismissed from the action."

The Court of Appeals decision also stated as follows with respect to the District Court's finding as to Mr. Carroll: (R. 152, footnote 3)

> "The trial court found only that Carroll was 'General Chairman of the General Grievance Committee of the Brotherhood on the property of the plaintiff' and that he notified the local groups to call off the strike after service of the temporary restraining order."

It is the carrier's contention that Mr. Carroll is not only an officer of the BRT but is the governing officer of that organization on the D&RGW (*cf.* Railway Labor Conference brief, page 3, footnote 2, describing a General Chairman as a "local official") and that he was jointly responsible with the BRT for the calling and conduct of the strike. It therefore argues that the action of the Court of Appeals in setting aside the judgment against Mr. Carroll was erroneous under Rule 52(a) of the Federal Rules of Civil Procedure (Br. 37-41). It is respectfully submitted that the carrier's contentions are wholly without merit.

The D&RGW argument that Mr. Carroll was an officer of BRT and hence responsible for the strike because he was General Chairman of the General Grievance Committee of BRT on the carrier property is not supported by the evidence.

The record shows that Mr. Carroll is elected to his position by chairman of grievance committees of local

lodges; that his salary is not paid by BRT but from funds contributed by members of the local lodges with representatives on the General Grievance Committee; and that the General Secretary-Treasurer of BRT testified without contradiction that Mr. Carroll "is not an officer of the Brotherhood of Railroad Trainmen" (R. 4-5). Nor did the District Court find that he was such an officer (R. 57-62).

In contrast, the D&RGW argues without any reference to the record that Mr. Carroll must be considered an officer of BRT because the General Grievance Committee is the instrumentality through which the BRT functions on the D&RGW and that the collective bargaining agreements between the carrier and the BRT are signed by Mr. Carroll alone. These are gratuitous conclusions without any foundation in the record. The D&RGW did not in the trial of the case believe it important to explore for the record the functions of the General Grievance Committee, to place the collective bargaining agreements in the record, or to explore the circumstances of the signing of the agreements. Having so failed, it cannot now rely upon such an argument.

Mr. Carroll's role of actual non-responsibility for the strike, as found by the Court of Appeals, is also fully supported by the evidence. The strike itself was authorized by the President of the BRT (R. 74). The original strike date was April 15, 1960. The President of the BRT notified the National Mediation Board by telegram that a strike had been authorized for such date and the Board, in turn, advised the D&RGW (R. 74, 148). The National Mediation Board then intervened under Section 5 of the Railway Labor Act (45 U.S.C.A., Section 155), and conducted unsuccessful

mediation. After the mediation terminated, the strike took place on May 16, 1960 (R. 74, 147). Mr. Carroll's only connection with the strike was his signature on a letter to the D&RGW advising the railroad that the strike would take place on May 16, 1960 (R. 147), and his subsequent transmittal to the local lodges by telephone and telegram advice that the District Court had issued a restraining order prohibiting the strike (R. 59, 74). The Court of Appeals correctly concluded that Mr. Carroll had no more to do with the strike than the chairmen of the locals and that the action should have also been dismissed as to him.

The D&RGW argues that the letter signed by Mr. Carroll and Mr. McDonald advising the D&RGW of the May 16, 1960, strike date (R. 147) shows a joint responsibility on their part for the strike. However, all that this letter shows in the context of the evidence is that the President of the BRT had authorized the strike which had originally been put off by National Mediation Board intervention, and that when a new date was set Mr. McDonald and Mr. Carroll notified the D&RGW of such date. The letter does not support the responsibility of Mr. McDonald, who was an officer of the BRT and who was not sued, much less the responsibility of Mr. Carroll. The D&RGW argues, however, that Mr. Carroll's responsibility is shown by the provisions of BRT rules, which it quotes in Appendix B to its brief, giving authority to the President of the BRT and General Grievance Committees to authorize strikes. These rules do not say that every strike will be jointly authorized by the President of the BRT and the General Grievance Committee and there is no evidence in the record that this strike was so jointly authorized. Indeed, the rules relied upon by

the D&RGW are not of record and there has been no trial of their application to this particular strike.

The D&RGW also argues that the fact that Mr. Carroll issued instructions to local lodges to call off the strike when he was served with a restraining order by the District Court shows that his authority was primary and that his instructions were final as to whether or not the strike was to continue or terminate. Mr. Carroll was a defendant in that action along with the chairmen of the local lodges having members employed by the D&RGW and consequently the restraining order was directed to both him and these local chairmen.[14] The restraining order was served upon Mr. Carroll (R. 59). His prompt notice to the local chairmen of the issuance of the restraining order and his instructions to call off the strike in accordance therewith do not prove his responsibility for the strike but only that he acted in a responsible manner to carry out the order of the District Court.[15]

There thus does not exist any factual basis for Mr. Carroll's responsibility and liability. Moreover, this Court has held that individual officers, agents, or members of a union may not be sued under Section 301 of the Labor-Management Relations Act for damages alleged to have been caused by an illegal strike called by a union. *Atkinson* v. *Sinclair Refining Co.*, 370 U.S.

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[14] See *Denver & R. G. W. R. Co.* v. *Brotherhood of Railroad Trainmen, et al.*, 185 F. Supp. 369 (1960).

[15] The D&RGW argues that the statements of position of the BRT before the District Court recognize the joint responsibility of Mr. Carroll for the strike (Br. 39-40). However, none of the carrier's quotations constitute a recognition of responsibility of Mr. Carroll for the strike as contrasted with the fact that there was evidence of his relationship to the strike as cited above.

238, 248 (1962); *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 470 (1960).

It is submitted that it is highly unreasonable to suppose that Congress would make it a national labor policy to exclude union members and agents from liability in suits specifically authorized under the National Labor Relations Act, and at the same time authorize such liability in suits based on the Railway Labor Act where it has not specifically provided for any type of suits against unions thereunder, and where even a suit for injunctive relief to enforce the duties of the statute must be implied. *Virginian Railway Co.* v. *System Federation No. 40, et al.*, 300 U.S. 515.

CONCLUSION

Upon the basis of the foregoing points and authorities, this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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APPENDIX "A"

Statute Involved

1. Section 1391 of Title 28 of the United States Code Prior to Amendment of November 2, 1966 (28 U.S.C.A., Section 1391):

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

(d) An alien may be sued in any district.

(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

(f) A civil action on a tort claim arising out of the manufacture, assembly, repair, ownership, maintenance, use, or operation of an automobile may be brought in the judicial district wherein the act or omission complained of occurred.

2. Amendments of November 2, 1966, to Section 1391 of Title 28 of the United States Code (Public Law 89-714; 80 Stat. 1111):

Subsections (a) and (b) of section 1391 of title 28 of the United States Code are amended to read as follows:

"(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

"(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law."

Sec. 2. Subsection (f) of section 1391, title 28, United States Code, is hereby repealed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 794

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF RAILROAD TRAINMEN ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE

Pursuant to Rule 42(2) and the written consent of the parties hereto, Railway Labor Executives' Association files this brief as *amicus curiae.*

INTEREST OF AMICUS CURIAE

Railway Labor Executives' Association is a voluntary unincorporated association located in Washington, D. C., which is composed of the chief executive officers of each of the following 23 standard national and international railway labor organizations:

American Railway Supervisors Association
American Train Dispatchers' Association
Brotherhood of Locomotive Firemen and Enginemen
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Trainmen
Brotherhood of Railroad Signalmen
Brotherhood Railway Carmen of America
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes
Brotherhood of Sleeping Car Porters
Hotel and Restaurant Employes and Bartenders' International Union
International Association of Machinists and Aerospace Workers
International Brotherhood of Boilermakers and Blacksmiths
International Brotherhood of Electrical Workers
International Brotherhood of Firemen and Oilers
International Organization Masters, Mates and Pilots of America
National Marine Engineers' Beneficial Association
Order of Railway Conductors and Brakemen
Railroad Yardmasters of America

Railway Employes' Department, AFL-CIO
Seafarers' International Union of North America
Sheet Metal Workers International Association
Switchmen's Union of North America
Transportation-Communication Employees Union

The foregoing organizations affiliated with the Railway Labor Executives' Association (hereinafter "Labor Executives") represent, for collective bargaining purposes under the Railway Labor Act, the bulk of the nation's rail employees. This Court has on several occasions recognized Labor Executives as a proper party to appear and speak for those affiliated organizations and their railroad employee members. *Interstate Commerce Comm.* v. *Railway Labor Executives' Assn.*, 315 U.S. 373; *Railway Labor Executives' Assn.* v. *United States*, 339 U.S. 142; *American Trucking Assns.* v. *United States* (and *Railway Labor Executives' Assn.* v. *United States*), 355 U.S. 141.

Each of these organizations has a vital and indeed an obvious interest in the affirmance of the judgment below. For, if the decision below should be reversed, it will follow that every one of the 23 railway labor organizations listed above can be sued, not simply in the judicial district wherein it has its headquarters —i.e., its principal place of business—but in every judicial district in the entire country where any of its hundreds of thousands of employees may find themselves in legal controversy with even a single one of the 95 railroads and switching and terminal companies represented by National Railway Labor Conference (hereinafter "Conference"), which appears as *amicus curiae* against the judgment below; see Conference Br. 39-41.

Otherwise stated, unless the decision below is affirmed, the funds and assets of every national and international railway organization can be reached in every lawsuit brought against any of its subordinates in every judicial district where any of its members operate. Labor Executives have an obvious interest in demonstrating, as they do in this brief, that the court below was plainly and obviously correct in holding that nothing in the statutory materials justifies or supports any such far-reaching consequences; and that the petitioner railroad and Conference are asking this Court to rewrite an Act of Congress, because, fairly construed, the statutes now on the books require rejection of the arguments here advanced to reverse the ruling below.

SUMMARY OF ARGUMENT

A. The only appellate decision on the applicability of the general venue provision of the Judicial Code of 1911 to the present case (§ 51; 28 U.S.C. [1926-1946 eds.] § 112) holds that it did not permit an unincorporated association to be sued elsewhere than at its principal place of business. *Brotherhood of Locomotive Firemen* v. *Graham*, 175 F. 2d 802 (D.C. Cir.), reversed on other grounds, 338 U.S. 232. The case of *Sperry Products* v. *Association of American R.R.*, 132 F. 2d 408 (C.A. 2), dealt only with the substantially broader patent venue provision (Jud. Code § 48; 28 U.S.C. [1926-1946 eds.] § 109), and held that under the terms of that specialized section, which permitted suit to be brought where the defendant committed acts of infringement and had a regular place of business, an unincorporated association could be sued either at its principal place of business or at any of

its regular and established places of business where it might have infringed.

B. The parties are in agreement that, by reason of the inapplicability of the National Labor Relations Act as amended to employers and employees who are subject to the Railway Labor Act as amended, the venue provisions of 29 U.S.C. § 185(c) do not affect the present controversy.

C. By making special provision for the venue of actions against corporations in 1948 without any mention of unincorporated associations, see 28 U.S.C. § 1391 as originally enacted, Congress plainly rejected the notion of treating the latter like corporations; and nothing in the legislative history of the revision of Title 28 of the United States Code even remotely suggests the contrary. It was only by imputing to Congress an intent that it did not express in either the language or the background of 28 U.S.C. § 1391(c) that the court in *Rutland Railway Corp.* v. *Brotherhood of Locomotive Eng.*, 307 F. 2d 21 (C.A. 2), certiorari denied, 372 U.S. 954, was able to conclude that an unincorporated association could be sued in federal question litigation in any judicial district in which it did business. That decision on analysis is shown to be demonstrably wrong, and the court below was well advised not to follow it.

D. No other statute dealing with venue enacted since 1948 has any bearing on the present case. In particular, 28 U.S.C. § 1391(b) as amended in November 1966 does not apply, because the district in which the present claim arose was the Northern District of Ohio, where respondent has its principal place of business; that is where the strike on which the complaint rests was called.

E. This Court has only recently held that whether unincorporated labor unions are to be assimilated to the status of corporations is a matter for legislative rather than judicial determination. *Steelworkers* v. *Bouligny, Inc.*, 382 U.S. 145. True, that decision dealt with diversity jurisdiction and not with venue, but the whole tenor of its reasoning rejects emphatically the facile transformation of unincorporated labor unions into corporations now urged by the petitioner railroad, transformation that would have this Court rewrite the general venue statute in a way that Congress plainly did not write it in 1948.

F. Finally, the petitioner railroad is not helped by *Pure Oil Co.* v. *Suarez*, 384 U.S. 202. All that that decision holds is that, where a given case falls within two venue statutes, the broader one prevails. But that does not help the railroad here, because the only provision under which the present case could conceivably be brought would be the general statute, 28 U.S.C. § 1391(c).

Congress plainly knows how to make labor unions suable in any district where they do business. 29 U.S.C. § 185(c); 29 U.S.C. § 412. But, admittedly, neither of those provisions is applicable here. Consequently what the petitioner railroad asks here is that this Court rewrite and expand the general venue statute, 28 U.S.C. § 1391(c). The court below, which properly refused the same invitation, was therefore right; and its judgment should accordingly be affirmed.

ARGUMENT

CONGRESS HAS NOT ONLY NOT AUTHORIZED AN UNINCORPORATED RAILWAY LABOR ORGANIZATION TO BE SUED ELSEWHERE THAN AT ITS PRINCIPAL PLACE OF BUSINESS IN RESPECT OF THE PRESENT CAUSE OF ACTION, IT HAS BY CLEAREST IMPLICATION INDICATED THAT TO BE THE ONLY PLACE WHERE SUCH AN ORGANIZATION CAN BE LAWFULLY REACHED IN THIS TYPE OF CASE

Once attention is focused, as it must be, on the enactments made by Congress respecting venue, it becomes plain that the contentions now advanced by the petitioner railroad (hereinafter "Denver & Rio Grande"), and by Conference as its auxiliary, involve, not construction of the applicable statutes, but only arguments for changes in those statutes, arguments that are properly addressed to Congress alone, and that hence are quite inappropriate here.

Labor Executives believe that the correctness of the result reached by the court below will appear most clearly if the several statutory provisions are considered chronologically in the order of their adoption.

A. Nothing in the Judicial Code of 1911 authorized ordinary civil litigation against an unincorporated association elsewhere than at its principal place of business

The general venue provision of the Judicial Code (Sec. 51; 28 U.S.C. [1926-1946 eds.] § 112) mentioned neither corporations nor unincorporated associations in respect of federal question litigation; it spoke only of "any person"; it simply said that—

> "except as provided in the six succeeding sections [28 U.S.C. (1926-1946 eds.) §§ 113-118], no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; * * *"

In respect of patent litigation, there was a broader provision, as follows (Judicial Code, § 48; 28 U.S.C. [1926-1946 eds.] § 109):

> "Sec. 48. In suits brought for the infringement of letters patent the district courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought."

Thereafter, in 1922, this Court held in *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, that an unincorporated association could be sued on the footing that it had legal personality distinct from that of its members. This conclusion was codified in 1938 by Rule 17(b), F.R. Civ. P., which provided that

> "capacity to sue or be sued shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States."

This background must be kept in mind in evaluating the *decision*—italics advisedly used—the decision in *Sperry Products* v. *Association of American R. R.*, 132 F. 2d 408 (C.A. 2).

That was an action for the infringement of a patent, brought in the Southern District of New York against several defendants including the Association of American Railroads, which had its "principal office" in the District of Columbia. On plaintiff's appeal from a judgment of dismissal (44 F. Supp. 660), the Second Circuit held (132 F. 2d at 411-412):

> "* * * we think that if a patentee chooses to sue an unincorporated association under the doctrine of United Mine Workers v. Coronado Coal Co., supra, 259 U.S. 344, * * * he must do so either at its principal place of business, or at any of the regular and established places of its business where it may have infringed.
>
> * * * * *
>
> "The judgment will therefore be reversed as to the Association * * *. If the plaintiff * * * wishes to proceed against the Association, the issue should first be tried whether its principal place of business is within the Southern District of New York."

Reading Judicial Code § 48 and Rule 17(b) together, the result is foreordained—and the holding a narrow one, easily reached from the statute and from the rule having the effect of statute. Of course it applies only in a patent infringement case; plainly the decision did not deal with any problem under the general venue statute.

All else in *Sperry Products* simply reflects the mental processes of the thoughtful and distinguished judge who wrote the opinion. Accordingly the bulk of the opinion is purest dictum, and however much either Denver & Rio Grande or Conference may savor particular portions of its philosophizing, no portion thereof is authoritative in any precedential sense.

Indeed, the only other decision dealing with the effect of the general venue statute on the suability of an unincorporated association in a district other than that of its principal place of business is squarely against petitioner's reading. *Brotherhood of Locomotive Firemen* v. *Graham,* 175 F. 2d 802 (D.C. Cir.), reversed on other grounds, 338 U.S. 232.

The Brotherhood of Locomotive Firemen had its principal place of business in Cleveland in the Northern District of Ohio. Hence the first question in the cited case was whether Graham's action, brought against the Brotherhood in the District of Columbia, was governed by the local venue provision (D.C. Code [1940 ed.] § 11-308), which prohibited actions by original process against any person "who shall not be an inhabitant of, or found within, the District, except as otherwise specially provided," or whether it was ruled by the general venue provision, Judicial Code § 51 (28 U.S.C. [1946 ed.] § 112), quoted *supra,* p. 7.

The District of Columbia Circuit held itself not required to determine whether the Brotherhood could be said to be "found" within the District of Columbia, in the sense of the local venue provision, by virtue of maintaining there its national legislative representative's office, because in the view of the court the case was governed by the Federal statute; and because, citing the *Sperry Products* case, an unincorporated association is an "inhabitant" only of the district in which its principal place of business is located. However, by reason of the then newly enacted transfer provision, 28 U.S.C. § 1406(a), the District of Columbia Circuit ordered the case transferred to the Northern District of Ohio.

On certiorari, this Court reversed (*Graham* v. *Brotherhood of Locomotive Engineers,* 338 U.S. 232), holding the District of Columbia venue provision to be applicable.

That decision then, like *Sperry Products* and the other case discussed below *(infra,* pp. 25-26), establishes that a particular venue provision prevails over a general one. In *Sperry* the patent provision with its wider scope prevailed over the general venue statute; in *Graham,* the District of Columbia provision with its wider "or found within" similarly governed.

But, as long as Judicial Code § 51 (28 U.S.C. [1926-1946 eds.] § 112) was in effect, no appellate court ever construed it to permit unincorporated associations to be sued in ordinary civil actions involving federal questions anywhere but at such an association's principal place of business.

B. It is common ground between the parties that this controversy is unaffected by the venue provision in 29 U.S.C. § 185(c)

One of the points of agreement—one of the few points of agreement—between the parties in this cause is that the present action is unaffected by the venue provision of Section 301(c) of the Labor-Management Relations Act enacted in 1947, now 29 U.S.C. § 185(c), which reads as follows:

> "(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized

officers or agents are engaged in representing or acting for employee members."

The basic reason why that provision is inapplicable here is because the National Labor Relations Act, as amended by the Labor-Management Relations Act and as further amended by other legislation, simply has no relevance to any actions or activities that, as here, are subject to the Railway Labor Act.

Thus, the National Labor Relations Act definition of an "employer" specifically excludes "any person subject to the Railway Labor Act, as amended from time to time" (29 U.S.C. § 152(2)), while the same Act's definition of "employee" similarly excludes "any individual employed by an employer subject to the Railway Labor Act, as amended from time to time" (29 U.S.C. § 152(3)).

The scheme, the grievance procedures, indeed every phase and aspect of the Railway Labor Act are totally different from the corresponding provisions of the National Labor Relations Act. There is no need at this juncture to rehearse the differences, all of which are thoroughly familiar to the Court, and all of which are virtually axiomatic so far as the parties to the present litigation are concerned. Significantly, neither Denver & Rio Grande nor Conference rely on 29 U.S.C. § 185(c) in their briefs, and indeed Denver & Rio Grande was at pains earlier to stress the inapplicability of that provision (Reply Br. 4).

Only one decision leans even arguably to the contrary, and that is the ruling of a district court that appears quite unaware of the mutual exclusiveness of the Railway Labor Act and the National Labor Relations Act. *American Airlines, Inc.* v. *Air Line*

Pilots Ass'n, 169 F. Supp. 777 (S.D. N.Y.). Consequently, what is there said (p. 782) regarding "the mood of Congress" cannot be taken seriously—particularly when attention is drawn, as it will be in the section immediately following, to the revision of Title 28 of the United States Code effective in 1948.

C. By making special provision for the venue of actions against corporations in its revision of Title 28 in 1948, without any mention of unincorporated associations, Congress plainly rejected the notion of treating the latter like corporations

As originally enacted in 1948, the venue provision of Title 28 provided as follows:

> **"§ 1391. Venue generally**
>
> "(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.
>
> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.
>
> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.
>
> "(d) An alien may be sued in any district."

The only light shed by the committee report on the differences between § 1391 and the superseded pro-

visions of the Judicial Code appears at p. A127 of H.R. Rep. No. 308, 80th Cong., 1st sess., as follows:

> "Word 'reside' was substituted for 'whereof he is an inhabitant' for clarity inasmuch as 'inhabitant' and 'resident' are synonymous." [Citing *Ex parte Shaw,* 145 U.S. 444, and two district court decisions.]
>
> * * * * *
>
> "In subsection (c), references to defendants 'found' within a district or voluntarily appearing were omitted. The use of the word 'found' made § 111 of title 28, U.S.C., 1940 ed., ambiguous. The argument that an action could be brought in the district where one defendant resided and a nonresident defendant was 'found,' was rejected in *Camp* v. *Gress,* 250 U.S. 308. However, this ambiguity will be obviated in the future by the omission of such reference."

Thus the sum total of the 1948 revision is, first, that Congress made specific provision for actions against corporations in any district in which they did business; and, second, that Congress said nothing about the venue of actions against unincorporated associations, either in the language of the statute or in the committee reports.

Insofar as resort may properly be had to the state of the decisional law, i.e., on the conventional if essentially fictitious basis that Congress is to be deemed to have reenacted what has already been judicially or even administratively decided, the result is not affected in any degree.

The decision in *Brotherhood of Locomotive Firemen* v. *Graham,* 175 F. 2d 802 (D.C. Cir.), which held that an unincorporated association could not be sued outside the district of its principal place of business under the general Federal venue provision, there deemed to

be controlling, certainly cannot be imputed to Congress on any basis, because it was handed down on October 26, 1948, subsequent to the revision of Title 28, which had become law on June 25 of the same year, effective on September 1.

Nor can the decision in *Sperry Products* v. *Association of American Railroads,* 132 F. 2d 408 (C.A. 2), be attributed to Congress, because that case construed, not the general venue provision then in effect, Judicial Code § 51, but only the specific patent infringement provision, Judicial Code § 48, which was broader. All else therein, as has been pointed out, was dictum purely and simply—and certainly Congress cannot be charged with having approvingly reenacted every interestingly phrased dictum emitted since the time of the last previous codification. Cf. *Commissioner* v. *Glenshaw Glass Co.,* 348 U.S. 426, 431; *Jones* v. *Liberty Glass Co.,* 332 U.S. 524, 533-534; cf. *F. W. Woolworth Co.* v. *United States,* 91 F. 2d 973, 976 (C.A. 2) (L. Hand, J.), certiorari denied, 302 U.S. 768.

In short, without imputing to Congress either an intent that it plainly did not have, or an intent that cannot fairly be drawn from the language of what was enacted, it is impossible to find in § 1391(c) any provision for permitting suit against unincorporated organizations elsewhere than at their principal place of business.

Yet that is precisely what the Second Circuit did in *Rutland Railway Corp.* v. *Brotherhood of Locomotive Eng.,* 307 F. 2d 21 (C.A. 2), certiorari denied, 372 U.S. 954. The heart of that decision in respect of venue is at p. 29, where Judge Waterman said:

> "Congress has stated in § 1391(c) that the residence of a corporation for venue purposes is not

> only in the state wherein it is incorporated but also in the places where it is licensed to do business and where it is doing business. It is true that we would be reading into 28 U.S.C. § 1391(c) words which are not there if we should assert that that subsection states that it applies to unincorporated associations. See Cherico v. Brotherhood of R. R. Trainmen, supra. But we do not find any manifestation here of a congressional policy of *expressio unius est exclusio alterius,* and so we follow the reasoning in Sperry Prods. and assimilate the residence of unincorporated associations under 28 U.S.C. § 1391(b) to that of corporations, 28 U.S.C. § 1391(c). Since the residence of a corporation for venue purposes has been expanded to include all the judicial districts in which the corporation is doing business, the residence of an unincorporated association for venue purposes should likewise be expanded to include all the judicial districts in which the unincorporated entity is doing business. We believe this accords with the practical requirements of litigation involving unincorporated associations."

It would be difficult, it is submitted, to find a more extreme example of judgment by fiat.

The second sentence of the quoted passage, "It is true that we would be reading into 28 U.S.C. § 1391(c) words which are not there if we should assert that that subsection states that it applies to unincorporated associations," is unexceptionable. But the obvious truism there expressed is immediately contradicted by the next sentence, "But we do not find any manifestation here of a congressional policy of *expressio unius est exclusio alterius*"—as if that principle of construction were inoperative except in instances where it was specifically set forth in those exact words—or except where Congress waved a yellow handkerchief to show that it

was legislating in the light of that principle. In this connection it should be noted that, as early as 1832, this Court declared that "'Expressio unius est exclusio alterius,' is an universal maxim in the construction of statutes." *United States* v. *Arredondo,* 6 Pet. 691, 725.

The second sentence then continues—

> "and so we follow the reasoning in Sperry Prods. and assimilate the residence of unincorporated associations under 28 U.S.C. § 1391(b) to that of corporations, 28 U.S.C. § 1391(c)."

That is a comment that quite overlooks that the *Sperry Products* case was dealing with venue in patent cases (Judicial Code, § 48), not venue generally (Judicial Code, § 51), and which similarly overlooks that the District of Columbia Circuit in the *Graham* case, 175 F. 2d 802, read *Sperry Products* as requiring precisely the opposite result.

Then follows the third sentence:

> "Since the residence of a corporation for venue purposes has been expanded to include all the judicial districts in which the corporation is doing business, the residence of an unincorporated association for venue purposes should likewise be expanded to include all the judicial districts in which the unincorporated entity is doing business."

The sentence just quoted really verges on the fantastic, for it includes not only a demonstrably erroneous premise but also a conclusion that involves a palpable *non sequitur.*

The premise is wrong, because the expansion of the residence of a corporation was effected, not by judicial fiat, but by specific legislative provision. In the

Sperry Products case, that expansion was specifically set forth in Judicial Code § 48; today, a similar expansion is applicable in all cases of actions against corporations by virtue of § 1391(c).

And the conclusion is wrong, because it does not at all follow that, because Congress has made particular provision for venue in actions against corporations, Congressional silence in respect of venue in actions against unincorporated associations implies that such proceedings are to be treated just like actions against corporations.

Otherwise stated, the conclusion does not follow even if the premise were correct—and it is not.

In short, the *Rutland Railway* case is, on its face, just as wrong as it could possibly be—and the court below in this case was well advised not to follow it.

D. No other statute dealing with venue that has been enacted since 1948 has any bearing on the present case

Certain other statutes relating to venue will now be discussed, but only for the sake of completeness, as none has any bearing whatever on the central issue of the present case.

(a) Section 102 of the Labor-Management Reporting and Disclosure Act of 1959, now 29 U.S.C. § 412, provides that:

> "Any person whose rights secured by the provisions of this subchapter [Bill of Rights of Member of Labor Organizations] have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district

court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

It is true that the Labor-Management Reporting and Disclosure Act of 1959 covers improper practices under the Railway Labor Act as amended, see 29 U.S.C. § 401(c). But the venue provision just quoted is limited to actions brought for the infringement of individual rights secured by that Act's provisions, and thus it plainly excludes the present action (R. 1-3, 7-10).

Denver & Rio Grande does not rely on 29 U.S.C. § 412 (Rep. Br. 4), and Conference does not mention it.

(b) The 1962 amendment to 28 U.S.C. § 1391, adding subsection (e) to permit Federal officers to be sued in any district, was designed to obviate the "superior officer" doctrine. See *Webster* v. *Fall,* 266 U.S. 507; *Colorado* v. *Toll,* 268 U.S. 228; *Williams* v. *Fanning,* 332 U.S. 490. Section 1391(e) is, obviously, both irrelevant and inapplicable here.

(c) In 1962, Congress added subsection (f) to § 1391 to deal with venue in tort claims arising out of the manufacture and operation, etc., of an automobile, permitting such actions to be brought in the judicial district wherein the act or omission complained of occurred. Subsection (f) was then repealed by the Act of November 2, 1966, Pub. L. 89-714, 80 Stat. 1111, which amended subsections (a) and (b) to include as proper districts for suit the one "in which the claim arose." Accordingly, §§ 1391(a) and (b) now read as follows:

"(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may,

except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

"(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law."

Assuming that Public Law 89-714, enacted subsequently to the date of the opinion and judgment below (R. 149, 152, 153), affects this case under the principle of *United States* v. *Alabama,* 362 U.S. 602, 604, and authorities there cited, it is significant that neither Denver & Rio Grande nor Conference contend that its enactment helps them; and neither invokes it directly.

The reason for their position in that regard may require a word of explanation: It is the fact, within the knowledge of Denver & Rio Grande, however much it may be obscured by the successive complaints filed herein (¶ 6, R. 2; ¶ 7, R. 8), that the strike on which the present cause of action rests was called by the respondent Brotherhood at its principal place of business in Cleveland, in the Northern District of Ohio. Accordingly, that is where the present claim arose within the meaning of 28 U.S.C. § 1391(b) as amended. See *Lodge No. 42* v. *International Brotherhood of Boilermakers,* 324 F. 2d 201 (C.A. 6), certiorari denied, 376 U.S. 913; *Coleman* v. *Brotherhood of Railway & Steamship Clerks,* 228 F. Supp. 276, 284 (S.D.N.Y.), affirmed on other grounds, 340 F. 2d 206 (C.A. 2).

That is why the only remarks addressed to the 1966 legislation by petitioner and its supporter are tangential only, and why both refrain from invoking it as determinative. Thus Denver & Rio Grande reads

into this new act an "implicit Congressional purpose" to expand venue (Pet. Br. 20-21, note 1), while Conference thinks it "*may* alleviate some of the serious consequences of the limitation on venue which would otherwise result from an affirmance of the decision below" (Conf. Br. 4, note 2; italics in original).

Conference's comments on Public Law 89-114, like its arguments for expanding § 1391(c) beyond the terms of that provision, are essentially legislative in character, concluding with the remark (Conf. Br. 4, note 2) that "it is predictable that the new provision will breed extensive litigation in the future."

Inasmuch as this precise new provision was drafted by the Judicial Conference of the United States (H.R. Rep. 1893, Sen. Rep. 1752, both 89th Cong., 2d sess.), the quoted comment all but suggests that before the Judicial Conference of the United States undertakes further amendments to Title 28, its members should first consult with the National Railway Labor Conference.

At any rate, it is plain that none of the venue legislation enacted after 1948, all of which has been discussed and set forth in the present subdivision of this brief, has any bearing whatever, much less any controlling effect, on the present controversy.

E. This Court has recently and emphatically held that whether unincorporated labor unions are to be assimilated to the status of corporations is a matter for legislative rather than judicial determination

Only at the last Term, in *Steelworkers* v. *Bouligny, Inc.*, 382 U.S. 145, this Court followed the settled rule (*Chapman* v. *Barney*, 129 U.S. 677) that an unincorporated labor union was not a "citizen" for purposes

of diversity jurisdiction, and that if any change was to be made in that rule, so as to give such unions corporate status for diversity purposes, that was a matter for legislative, not judicial, determination.

The court below relied on *Bouligny* in holding that the respondent Brotherhood of Railroad Trainmen could not be sued in the District of Colorado, where it did not maintain its principal place of business (R. 151). Of course the court below was aware that *Bouligny* dealt with diversity rather than with venue; nonetheless it found the rationale of *Bouligny* controlling, saying (R. 151):

> "Although the court in the Bouligny case was discussing the diversity statute, the holding was clearly to the effect that unincorporated associations were basically different from corporations. It was a rejection of the principle espoused by the Rutland case, upon which the Rio Grande relies to sustain venue."

The foregoing passage could be expanded and embellished, but hardly altered in substance.

Of course this Court in *Bouligny* was at pains to limit its decision "for diversity purposes" and "for purposes of diversity jurisdiction"; that limitation was expressed throughout (382 U.S. at 146, 147, 149, 150, 153). But the Court emphatically rejected the facile transformation of unincorporated labor unions into corporations that underlay both the Second Circuit's "great leap forward" in the *Rutland* case—"Since the residence of a corporation for venue purposes has been expanded to include all the judicial districts in which the corporation is doing business, the residence of an unincorporated association for

venue purposes should likewise be expanded to include all the judicial districts in which the unincorporated entity is doing business" (307 F. 2d at 29)—as well as the similar *tour de force* of the district judge in the *Bouligny* case itself (382 U.S. at 146), that because there is "a trend to treat unincorporated associations in the same manner as corporations and to treat them as citizens of the state wherein the principal office is located," it should follow that there is "no common sense reason for treating an unincorporated national labor union differently from a corporation."

However, since the excerpts just quoted from the Rutland opinion in the Second Circuit and from the *Bouligny* case at the district court level accurately capsulate the consistent theme of what Denver & Rio Grande and Conference are contending here, it seems worthwhile to quote this Court's disposition of the labor-unions-must-be-equated-to-corporations argument in the *Bouligny* case (382 U.S. at 149-150, 150-151, 153; footnotes omitted):

> "In recent years courts and commentators have reflected dissatisfaction with the rule of *Chapman* v. *Barney*. The distinction between the 'personality' and 'citizenship' of corporations and that of labor unions and other unincorporated associations, it is increasingly argued, has become artificial and unreal. The mere fact that a corporation is endowed with a birth certificate is, they say, of no consequence. In truth and in fact, they point out, many voluntary associations and labor unions are indistinguishable from corporations in terms of the reality of function and structure, and to say that the latter are juridical persons and 'citizens' and the former are not is to base a distinction upon an inadequate and irrelevant difference. They assert, with considerable

merit, that it is not good judicial administration, nor is it fair, to remit a labor union or other unincorporated association to vagaries of jurisdiction determined by the citizenship of its members and to disregard the fact that unions and associations may exist and have an identity and a local habitation of their own.

* * * * *

"We are of the view that these arguments, however appealing, are addressed to an inappropriate forum, and that pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts.

* * * * *

"Whether unincorporated labor unions ought to be assimilated to the status of corporations for diversity purposes, how such citizenship is to be determined, and what if any related rules ought to apply, are decisions which we believe suited to the legislative and not the judicial branch, regardless of our views as to the intrinsic merits of petitioner's argument — merits stoutly attested by widespread support for the recognition of labor unions as juridical personalities."

Of course *Bouligny* dealt with diversity; of course the present case involves only venue. But the passages just quoted apply with equal force to the present efforts of Denver & Rio Grande and of Conference to have this Court rewrite the venue statute in a way that Congress plainly did not write it in 1948. Their arguments made in favor of reversal in this case are essentially legislative in character. Accordingly they cannot prevail here, not because reasonable men would reject them out of hand, but because this Court is not an appropriate forum for their consideration.

F. Petitioner is not helped by the recent Suarez case

Finally, apparently as a last resort, Denver & Rio Grande invokes another decision of the last Term, *Pure Oil Co.* v. *Suarez,* 384 U.S. 202; see Pet. Br. 16, 22-23, 35-36.

Petitioner's reliance is misplaced. All that the *Suarez* case held was that the venue provision of the Jones Act (46 U.S.C. § 688) was to be held expanded by the later general venue statute, 28 U.S.C. § 1391(c).

Labor Executives would be prepared to go farther, and concede that, whenever there are two venue provisions, both of them applicable on their face, the broader one controls. Certainly that is the learning of a number of the other cases already discussed above, notably *Sperry Products* v. *Association of American R. R.,* 132 F. 2d 408 (C.A. 2), where the broader patent venue provision in Judicial Code § 48 controlled over the general venue provision in Judicial Code § 51, and *Graham* v. *Brotherhood of Locomotive Engineers,* 338 U.S. 232, where the broader District of Columbia venue provision was held applicable rather than the more restricted general provision of Judicial Code § 51 (28 U.S.C. [1946 ed.] § 112).

Similarly, an action under the Labor-Management Relations Act could be maintained under the broad provisions of 29 U.S.C. § 185(c), a section that would plainly not be limited by the narrower general terms of the subsequently enacted 28 U.S.C. § 1391. And, by parity of reasoning, an action to enforce the rights secured by the Labor-Management Reporting and Disclosure Act of 1959 can be brought as provided in 29 U.S.C. § 412, regardless of the terms of § 1391 as

now amended, whenever the latter should prove more restrictive.

But the concession thus made does not help the petitioner here. For Denver & Rio Grande can point to no statute that specifically authorizes suing the respondent Brotherhood of Railroad Trainmen in the District of Colorado where, admittedly, it does not maintain its principal place of business, an omission that is the more significant since Congress plainly knows how to write such a statute; 29 U.S.C. §§ 185(c) and 412, quoted above at pp. 11-12 and 18-19, respectively, show just that.

Consequently, faced with a lack of express authority to cover this situation, faced with the fact of express authority in other situations, Denver & Rio Grande's contentions are simply variations on the theme that the only applicable statute, 28 U.S.C. § 1391(c), should be broadened—which is to say rewritten—by this Court.

Under the rationale of the *Bouligny* case, which indeed marked no new departure in judicial approach, those contentions, however appropriate for presentation to the legislature, are both inappropriate and insufficient when put forward in the present judicial proceeding.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted.

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No. 794

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF RAILROAD TRAINMEN and R. E. CARROLL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I. Reversal of the Judgment of the Court of Appeals Would not be Legislation by the Court, but Rather a Correct Construction of the Statute Involved in This Case.

Both the respondents and the Railway Labor Executives' Association (RLEA) make basically the same argument to support the Court of Appeals' holding that venue against the BRT could not be laid in the district of Colo-

rado. The controlling statute, they contend, provides for venue as against an unincorporated labor union subject to the Railway Labor Act only in the district where it has its principal place of business; and any judicial decision permitting a broader venue would amount to legislation (Resp. Brief, pp. 10, 16, 17-18, 19, 21, 24-29; RLEA Brief, pp. 4, 6, 7, 8, 15-16, 24, 26). Thus it is said that petitioner's arguments in this Court "constitute purely legislative reasons" (Resp. Brief, p. 16). The opinion of the Court of Appeals in *Rutland Railway Corp.* v. *Brotherhood of Locomotive Engineers*, 307 F.2d 21 (2d Cir. 1962), cert. den., 372 U.S. 954 (1963), is called "outright legislation" (Resp. Brief, p. 10) and an "extreme example of judgment by fiat" (RLEA Brief, p. 16).

This argument by respondents and the RLEA is completely fallacious. The question decided in the *Rutland Railway* case—the same question that is now before this Court—is not one of legislation, but a matter of interpreting an existing statute.

In Section 1391(b) of the Judicial Code (28 U.S.C. § 1391(b), the general venue statute, Congress has provided that federal-question actions may be brought "in the judicial district where all defendants reside." Neither the venue statute nor any other statute relating specifically to actions against labor unions subject to the Railway Labor Act defines residence for such unincorporated associations.

Respondents and the RLEA concede, as they must, that the BRT and similar unions are subject to suit in the federal courts (Resp. Brief, p. 16; RLEA Brief, p. 8). Unquestionably, the BRT "resides" *somewhere*. Respondents and the RLEA claim that the BRT's residence is at Cleveland, Ohio, where it has its principal place of business (Resp. Brief, pp. 15, 32; RLEA Brief, pp. 3, 26). Congress, however, has neither fixed the residence of the BRT at its headquarters in Cleveland, nor stated that an

unincorporated union has but one residence. Petitioner submits that, within the meaning of Section 1391(b), the BRT "resides" in the district of Colorado. The issue thus framed is the construction of Section 1391(b), as it applies to unincorporated labor unions subject to the Railway Labor Act.

That issue is the one decided in the *Rutland Railway* case, where the Court of Appeals for the Second Circuit held that for venue purposes the residence of the union should "include all the judicial districts in which the unincorporated entity is doing business" (307 F.2d at 29). This holding was not legislation, but a construction of Section 1391(b) based on sound reasons and in accordance with the ratio decidendi of Judge Hand's opinion in *Sperry Products* v. *Association of American Railroads*, 132 F.2d 408 (2d Cir. 1942). The same issue is now before this Court; and in seeking reversal of the Court of Appeals, petitioner seeks not legislation, but a correct interpretation of an Act of Congress. Such interpretation is clearly within the proper scope of judicial decision.

We have shown in our principal brief the reasons why Section 1391(b) should be construed so as to permit venue of petitioner's action against the BRT to be laid in the district of Colorado—a district where occurred the unlawful strike which is the subject matter of this case, where petitioner conducts most of its operations, where most of petitioner's employees represented by the BRT reside and work, where the BRT's General Chairman Carroll resides and has his headquarters, and where petitioner and the BRT conduct collective bargaining negotiations and enter into collective agreements. On the basis of judicial opinion prior to 1948 and the enactment in 1947 of Section 301 of the Labor-Management Relations Act(29 U.S.C. § 185), we have shown the intent of Congress, in the 1948 enactment of Section 1391, to make unions, like corporations, subject to suit wherever they

are "doing business." The "business" of a union is representing employees.

This case is completely unlike *Steelworkers* v. *Bouligny*, 382 U.S. 145 (1965), which the Court of Appeals erroneously thought decisive, and on which respondents and the RLEA rely (Resp. Brief, pp. 25-29; RLEA Brief, pp. 21-24). The Court in *Bouligny* was dealing with a point of jurisdiction—not venue—which it held to be "a matter for legislative consideration" (382 U.S. at 147). The instant case, as shown above, is a matter of statutory construction. It lies, moreover, in an area of law that Congress has deliberately left to the federal courts.

The rule that unincorporated unions "are suable in the Federal courts" derives not from an Act of Congress, but from the decision of this Court in *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 391 (1922). And when Congress enacted the Railway Labor Act in 1926, it made no specific provision for enforcement of important duties imposed on unions as well as employers, but left it to the courts to develop "enforcement by proceedings appropriate to each" legal obligation. *Texas & N.O.R. Co.* v. *Brotherhood of Railway Clerks*, 281 U.S. 548, 569 (1930). That the courts have done. E.g., *Brotherhood of Railroad Trainmen* v. *Chicago River & I. R. Co.*, 353 U.S. 30, 41-42 (1957). And this Court may, with complete consistency, so construe Section 1391(b) as to permit actions to be brought against unions which violate the Railway Labor Act wherever such unions are engaged in representing employees under that Act.

II. The Claim That Venue Should be Restricted to Cleveland, Ohio, Is Unsound Both as a Matter of BRT "Residence" and Under Public Law 89-714.

The arguments of respondents and the RLEA with respect to Public Law 89-714 highlight the unreasonably narrow limitations which they would have the Court im-

pose on the venue of petitioner's action. Public Law 89-714, approved on November 2, 1966 (80 Stat. 1111), became effective after petitioner's petition for rehearing by the Court of Appeals had been denied. It amends Section 1391(b) to provide that venue in nondiversity cases is proper not only in the judicial district where all defendants reside, but also in the judicial district "in which the claim arose."

According to respondents and the RLEA, however, Public Law 89-714 could have no effect upon venue for petitioner's action. RLEA contends that "the strike on which the present cause of action rests was called by the respondent Brotherhood at its principal place of business in Cleveland, in the Northern District of Ohio. Accordingly that is where the present claim arose within the meaning of 28 U.S.C. § 1391(b) as amended" (RLEA Brief, p. 20). Respondents concur, adding the claim that part of the strike occurred in Utah, so that petitioner "can only put its claim into a single package for venue purposes by suing the BRT where it 'resides'" (Resp. Brief, p. 15).

Thus respondents and the RLEA insist that liability for an unlawful strike which occurred in Colorado, which involved petitioner's Colorado employees and which disrupted the operations of a railroad operating primarily in Colorado, may not be asserted in the judicial district of Colorado, but must be pursued some 1300 miles away at Cleveland, Ohio, because the offending union maintains its headquarters in the latter district.* This is claimed to be the proper result not only under the venue requirement of residence but also under the amendment which

* Respondents do state that petitioner's action could have been brought in the District of Columbia (Resp. Brief, p. 31). Assuming the BRT is "resident or found" within the District of Columbia as required by the local venue statute (D. C. Code, § 11-521 (1966 Supp.)), that jurisdiction is even more remote from petitioner's action than Cleveland, Ohio.

makes venue proper in the district in which the claim arises.

This Court in *Pure Oil Co.* v. *Suarez*, 384 U.S. 202 (1966), recently had occasion to note that the venue provisions of Section 1391 constituted "a response to a general conviction that it was 'intolerable if the traditional concepts of "residence" and "presence" kept a corporation from being sued wherever it was creating liabilities'" (384 U.S. at 204, note 2).* It is precisely such an "intolerable" situation which respondents and the RLEA urge this Court to approve. They seek to foster a venue concept which would permit a labor organization to participate in any conceivable action in districts far removed from its headquarters and then to draw venue concepts about it as a shield from prosecution except in the district in which it has chosen to establish its headquarters. It would be difficult indeed to conceive of a position more closely related to the "intolerable" situation which this Court described in the *Pure Oil* case.

In order to create the predicate for their argument in this Court, respondents and the RLEA find it necessary to adopt a theory of the case different from that which the respondent Brotherhood of Railroad Trainmen urged in the District Court. Thus RLEA states in this Court that the strike against the Rio Grande "was called by the respondent Brotherhood" at Cleveland, Ohio (RLEA Brief, p. 20). Respondents say, "The decision to conduct

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* This Court affirmed a decision by the Court of Appeals for the Fifth Circuit, 346 F.2d 890, 896-897 (1964), which stated that:

"There is a shocking inconsistency in a rule of law which permits a corporation to maintain a regular, established place of business in the district in question, transact a substantial amount of business there both before and after the event about which the plaintiff complains and at the time the suit is filed with the expressed intention to continue doing business in such locale, but allows the corporation to insist on a trial of the factual issues in the district in which it is incorporated or in which its principal office is located."

a strike was made by the President of BRT in Cleveland, Ohio" (Resp. Brief, p. 15). Counsel for the respondent Brotherhood, however, assured the District Court during the trial of this case that the strike in question was called "pursuant to a letter that was sent to the Railroad on May 16" (R. 28). The letter to which counsel referred emanated from the Denver headquarters of respondent R. E. Carroll, General Chairman of the Brotherhood of Railroad Trainmen on the Rio Grande and was signed by respondent Carroll and by grand lodge officer Vice President McDonald (R. 147-148). The only connection that this letter has with Cleveland, Ohio, is the indication that a copy of it was sent to Mr. W. P. Kennedy, president of the Brotherhood of Railroad Trainmen at Cleveland, Ohio. It is clear, therefore, that the instrument which precipitated the strike originated in Denver, Colorado, through the joint authority of the General Chairman, a resident of Colorado, and Mr. McDonald, a grand lodge officer present in Colorado at the time. These facts completely contradict the assertion that the strike was called by the Brotherhood at Cleveland, Ohio.

Moreover, respondents and the RLEA fail to explain how the strike could have been called by the Brotherhood at Cleveland, Ohio, in view of the precise provisions of the Constitution and General Rules of the Brotherhood. These provisions clearly require strike authorization by two-thirds of the members of the General Grievance Committee located on the Rio Grande in Colorado, of which respondent Carroll is Chairman, and the concurring authority of the president of the Brotherhood or his designee (Appendix B to Petitioner's Brief, pp. 49-50). In the present case the joint authorization of the Grand Lodge and the General Grievance Committee was apparently accomplished through the letter of May 16 which counsel for the Brotherhood identified as the strike-authorizing document.

Even if it be assumed that the strike was called by the Brotherhood at Cleveland, Ohio, it does not follow that claims based on such a strike arose at Cleveland, Ohio. Neither of the two cases cited for the statement that such claims would arise where the strike was authorized rather than where the strike occurred (Resp. Brief, p. 15; RLEA Brief, p. 20) involved issues even remotely relevant to the point for which the cases are cited. In *Lodge 42* v. *International Brotherhood of Boilermakers*, 324 F.2d 201 (6th Cir. 1963), cert. den., 376 U.S. 913 (1964), the court held that venue of an action against certain labor organizations for wrongfully expelling plaintiffs was not properly laid in the middle district of Tennessee. The court pointed out, in holding that venue was improper, "that neither of the defendants has its principal office in that district and *neither is alleged to have done anything there*" (324 F.2d at 202) (emphasis supplied). It is difficult to perceive how this holding can be deemed relevant in the present situation where the activity, i.e., the strike, upon which liability is predicated occurred in the district in which the suit was brought. In *Coleman* v. *Brotherhood of Railway and Steamship Clerks*, 228 F. Supp. 276 (S.D.N.Y. 1964), plaintiffs sought to challenge the election of certain union officers. The election in question had occurred in California and the union maintained its principal office in Ohio. The action was brought in the Southern District of New York and the court held that since the action had not been brought where the election was held or where the principal office of the Brotherhood was located venue was not proper. This again was a situation in which none of the activity upon which the complaint was based had occurred in the district in which the action was instituted. There is no authority for the position that a claim based on an unlawful strike does not arise in the district in which the strike occurs.

It is also suggested that because petitioner has not invoked the provisions of Public Law 89-714 as "determina-

tive" the amendment is not relevant to the present litigation (Resp. Brief, p. 14; RLEA Brief, p. 20). It must be emphasized first that the statute in question was passed and approved after the Court of Appeals had denied petitioner's petition for rehearing and during the course of the preparation of a petition for a writ of certiorari. Since the amendment does not resolve the question of the residence of unincorporated unions for venue purposes and since the Court of Appeals' decision on this matter appeared to be erroneous, petitioner determined to seek review by this Court.

As our principal brief emphasizes, the question of the residence of unincorporated labor unions for venue purposes continues to be one of great importance with respect to which a decision by this Court is urgently required. Under a correct construction of Section 1391(b), we submit, Public Law 89-714 is not "determinative" because the BRT "resides" for venue purposes in the district of Colorado, and further issues of where "the claim arose" need not be reached. We submit that venue was proper in the district of Colorado without regard to Public Law 89-714, and that no further litigation with respect to venue is necessary.

As the RLEA suggests, however, Public Law 89-714 might well be applicable under the principle of *United States* v. *Alabama*, 362 U.S. 602 (1960) (RLEA Brief, p. 20). Accordingly we respectfully submit that, should this Court hold that the Brotherhood is not a "resident" of the district of Colorado, proper disposition of the case would be a remand for consideration of the propriety of venue in Colorado under Public Law 89-714.

We respectfully urge, nonetheless, that our position on the merits is correct and that the Brotherhood should be held to be a "resident" of the district of Colorado for venue purposes. No other holding can resolve the issue of venue as against unions subject to the Railway Labor

Act consistently with the principal that large national organizations should be subject to suit "wherever they are creating liabilities."

CONCLUSION

For the foregoing reasons and those stated in our principal brief, the decision of the Court of Appeals should be reversed with directions to the Court of Appeals to proceed to a consideration of the issues other than venue which were raised by the appeal from the judgment of the District Court.

Respectfully submitted,

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April, 1967

SUPREME COURT OF THE UNITED STATES

No. 794.—October Term, 1966.

The Denver and Rio Grande Western Railroad Co., Petitioner, *v.* Brotherhood of Railroad Trainmen et al.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[June 5, 1967.]

Mr. Justice White delivered the opinion of the Court.

The question here concerns the proper venue for a suit against a labor union, an unincorported association, under 28 U. S. C. § 1391 (b), which at the time this action was brought read as follows: "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

In December 1959 and January 1960, the National Railroad Adjustment Board issued monetary awards in favor of certain members of respondent union on their claims for breach of collective bargaining contracts between the union and petitioner, the Denver & Rio Grande Western Railroad Company. The railroad refused to honor the awards, the union struck to enforce them and the strike was permanently enjoined by the District Court. 185 F. Supp. 369, aff'd, 290 F. 2d 266, cert. denied, 366 U. S. 966. The railroad then sued the union for damages in the United States District Court for the District of Colorado, also joining as defendants R. E. Carroll, chairman of the union's General Grievance Committee on the property of petitioner, and the chairmen of various local lodges of the union. The complaint

alleged that the defendants had breached their duties under the Railway Labor Act, 45 U. S. C. § 151 *et seq.* The District Court overruled the union's motion to dismiss for improper venue, held the strike illegal because the union had failed to exhaust its statutory remedies to enforce the Adjustment Board awards, and awarded damages based on the railroad's loss of traffic caused by the illegal strike. The judgment ran against both the union and Carroll, the case against the other defendants being dismissed for failure of proof. The Court of Appeals reversed, holding that the union could be sued under § 1391 (b) only in the district of its residence and that its residence was not in Colorado.[1] We granted certiorari because of the seeming conflict with *Rutland Ry. Corp.* v. *Brotherhood of Locomotive Eng'rs*, 307 F. 2d 21. 385 U. S. 1000. We reverse.

Section 1391 (b) is the general venue statute governing transitory causes of action in the federal courts where jurisdiction does not depend wholly on diversity of citizenship. Following its amendment in 1966, Pub. L. 89–714, § 1, 80 Stat. 1111, the section permits suit either in the district where all of the defendants reside or in the district where the cause of action arose. At the time this suit was brought, however, venue lay only at the defendant's residence, as had been the case since 1887. 24 Stat. 552, as corrected by 25 Stat. 433 (1888). Thus for almost 80 years proper venue in federal question cases was limited to the district of the defendant's residence, whether the defendant was an individual, a corporation, or an unincorporated association such as this respondent. During all of this time, down to and including the 1966

[1] The Court of Appeals also reversed the damage award against respondent Carroll, concluding that Carroll was not responsible for the strike in question. We do not disturb this factual determination of the Court of Appeals. Carroll's residence is admittedly within the District of Colorado.

amendment, Congress has not expressly defined the residence of an unincorporated association for purposes of the general venue statute. The same was true with respect to corporations until 1948 when Congress directed that a corporation could be sued in the judicial district "in which it is incorported or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." 28 U. S. C. § 1391 (c). Congress has maintained its silence, however, with respect to the residence of the unincorporated association. The resolution of that issue, as was true for the corporation prior to 1948, has been left to the courts. The issue is now here for the first time.

Of course, venue for a suit against an unincorporated association becomes important only if the association is suable in the first instance. At common law, such an association could be sued only in the names of its members and liability had to be enforced against each member. This principle was rejected in *United Mine Workers* v. *Coronado*, 259 U. S. 344, where this Court, recognizing the growth and pervasive influence of labor organizations and noting that the suability of trade unions "is of primary importance in the working out of justice and in protecting individuals and society . . . ," 259 U. S., at 390, held that such organizations were suable in the federal courts and that funds accumulated by them were subject to execution in suits for torts committed during strikes. The *Coronado* holding is now reflected in Fed. R. Civ. Proc. 17 (b).

The *Coronado* case dealt with capacity to be sued, not with venue, but it did legitimate suing the unincorporated association as an entity. Although that entity has no citizenship independent of its members for purposes of diversity jurisdiction, *Steelworkers* v. *Bouligny*,

Inc., 382 U. S. 145, a case relied upon by the Court of Appeals here, we think that the question of the proper venue for such a defendant, like the question of capacity, should be determined by looking to the residence of the association itself rather than that of its individual members. Otherwise, § 1391 (b) would seem to require either holding the association not suable at all where its members are residents of different States, or holding that the association "resides" in any State in which any of its members resides. The first alternative seems wholly at odds with *Coronado* and in addition removes federal question litigation from the federal courts unnecessarily; the second is patently unfair to the association when it is remembered that venue is primarily a matter of convenience of litigants and witnesses. H. R. Rep. No. 1983, 89th Cong., 2d Sess., p. 2. Of course, having concluded that the unincorporated association should be viewed as an entity for purposes of residence under § 1391 (b), that residence must still be ascertained, an inquiry requiring examination of Congressional intent and the interests reflected in *Cornado* and in principles underlying venue limitations.

In *Sperry Prods., Inc.* v. *Association of American Railroads*, 132 F. 2d 408, the Court of Appeals for the Second Circuit dealt with the issue of what district an unincorporated association may be said to inhabit under the special venue statute governing patent suits, then 28 U. S. C. A. § 109, now 28 U. S. C. § 1400. That court thought the association should be treated like a corporation. Under the decisions of this Court, corporations had a single residence for venue purposes, the State of their incorporation. Likewise, the *Sperry* court thought the unincorporated association should be considered as having a single residence, in its case its principal place of business. *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, had already determined, however, that corporations,

while having only one residence, nevertheless consented to be sued in federal diversity suits where they were licensed to do business. And *Neirbo* had much to do with producing the 1948 congressional definition of corporate residence as including not only the State of incorporation but wherever the corporation is licensed to do business or is doing business.

It can be argued, as respondent does, that had the 1948 Congress intended the expanded definition of corporate residence to apply to labor unions and other incorporated associations, it would have said so. But even accepting this, the question of what the association's residence is for venue purposes remains unanswered. Saying that Congress did not intend to "change" the venue law with respect to unincorporated associations assumes a settled meaning to the prior law. This was not the case. There was no settled construction of the law in the courts in 1948, and there is none yet. Nor was there anything to indicate that Congress had considered a labor union's residence to be in only one place or had ever intended a limited view of residence with respect to unincorporated associations. Rather than accepting respondent's position, we view the action of Congress in 1948 as simply correcting an unacceptably narrow definition of corporate residence which had been adopted by the courts, while maintaining its silence with respect to the unincorporated association. And if it is assumed that Congress was aware of *Sperry* at all, it is surely reasonable to think that Congress anticipated that the approach of that case, analogizing incorporated and unincorporated entities, would continue to be followed by the courts so that if corporate residence were broadly defined by the Congress, the courts would similarly construe the concept of residence of the unincorporated association. This was the approach of the Court of

Appeals for the Second Circuit in *Rutland Ry. Corp.* v. *Brotherhood of Locomotive Eng'rs, supra.*[2]

We think it most nearly approximates the intent of Congress to recognize the reality of the multi-state, unincorporated association such as a labor union and to permit suit against that entity, like the analogous corporate entity, wherever it is "doing business." Congress has itself recognized as much in a special venue statute, 29 U. S. C. § 185 (c), which provides that actions against labor unions governed by the Labor Management Relations Act may be brought in any district where the union maintains its principal office or in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members. That statute was enacted but a year before the 1948 revision of the Judicial Code, and while it does not mention residence, it is a considerable indication that Congress had no desire, then or at any previous time, to construe "residence" as used in the general venue provision so as to confine suits against a labor union to the district where its principal office is located. Moreover, from the standpoint

[2] Other lower court cases are divided on the question whether an unincorporated association can be sued at a place other than its principal place of business. Cases restricting venue to the association's principal place of business include *Brotherhood of Locomotive Firemen* v. *Graham*, 175 F. 2d 802, 804, n. 2, rev'd on other grounds, 338 U. S. 232; *McNutt* v. *United Gas, Coke & Chem. Workers*, 108 F. Supp. 871, 875; *Salvant* v. *Louisville & N. R. Co.*, 83 F. Supp. 391, 396; *Westinghouse Elec. Corp.* v. *United Elec. Radio & Mach. Workers*, 92 F. Supp. 841, aff'd without discussion, 194 F. 2d 770; *Cherico* v. *Brotherhood of R. R. Trainmen*, 167 F. Supp. 635, 637–638; cf. *Hadden* v. *Small*, 145 F. Supp. 387 (partnership). Cases holding that unincorporated associations may be sued where they do business: *Portsmouth Baseball Corp.* v. *Frick*, 132 F. Supp. 922; *Eastern Motor Express, Inc.* v. *Espenshade*, 138 F. Supp 426, 432; *American Airlines, Inc.* v. *Air Line Pilots Ass'n*, 169 F. Supp 777, 781–783; *R & E Dental Supply Co.* v. *Ritter Co.*, 185 F. Supp. 812; cf. *Joscar Co.* v. *Consolidated Sun Ray, Inc.*, 212 F. Supp. 634.

of convenience to parties and witnesses, there would be little merit in holding that suits against unions covered by the National Labor Relations Act may be brought anywhere the responsible representatives of the union take concrete action and yet hold that suits for similar conduct against unions subject to a parallel federal labor statute, the Railway Labor Act, may be brought only where the union's principal offices are located. Nor need we here be concerned, as in *Bouligny*, with possible effects on the scope of the jurisdiction of the federal courts. Under these circumstances, for this Court to create such a distinction without some positive lead from Congress and in the face of sound policy considerations to the contrary would be unjustified.

We therefore conclude that the Court of Appeals improperly applied § 1391 (b) as it read when this suit was brought. But even if we instead agreed with the Court of Appeals on this question, the case must be considered in light of the present form of that section, that is, as amended by the Act of November 2, 1966, which provides for venue not only at the place of a defendant's residence but also in the district where the cause of action arose. This amendment does not change the substantive law applicable to this lawsuit. It is wholly procedural. Absent some contrary indications by the Congress and absent any procedural prejudice to either party, the 1966 amendment to § 1391 is applicable to this suit. See *United States* v. *Alabama*, 362 U. S. 602; *Ex parte Collett*, 337 U. S. 55; *American Foundries* v. *Tri-City Council*, 257 U. S. 184, 201; *Pruess* v. *Udall*, 359 F. 2d 615. As this Court said in applying 28 U. S. C. § 1404 (a) to pending actions, "No one has a vested right in any given mode of procedure." *Ex parte Collett*, 337 U. S., at 71. And in any event, if the decision below were affirmed, the petitioner could reinstitute the same action in the same District Court

and seek the benefits of the current version of § 1391, absent the barrier of any applicable statute of limitations. We do not, of course, intimate any views as to whether this cause of action "arose" in the District of Colorado. That would be an issue for the District Court should it now be determined, in light of this opinion, that respondent was not doing business in Colorado when this suit was instituted.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 794.—October Term, 1966.

The Denver and Rio Grande Western Railroad Co., Petitioner, v. Brotherhood of Railroad Trainmen et al.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[June 5, 1967.]

Mr. Justice Black, with whom Mr. Justice Douglas, and Mr. Justice Fortas join, dissenting.

This suit for damages caused by an illegal strike was brought by the Denver and Rio Grande Western Railroad against the Brotherhood of Railroad Trainmen and certain of its individual members in the United States District Court for Colorado where the Brotherhood's local lodges went on strike. The Brotherhood, an unincorporated association with its headquarters and principal place of business in Cleveland, Ohio, filed a motion to dismiss on the ground of improper venue. The District Court denied this motion, and after a trial without a jury, gave the railroad a $37,988 judgment against the union. The Court of Appeals reversed. 367 F. 2d 137. It held that the applicable venue statute, 28 U. S. C. § 1391 (b),[1] gave venue only to the district court for the district where the union's principal place of business is located. I would affirm this holding.

In holding venue improper as to the union, the Court of Appeals rejected the holding of the Second Circuit in *Rutland R. Co.* v. *Brotherhood of Locomotive Eng'rs*,

[1] 28 U. S. C. § 1391 (b):

"A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

307 F. 2d 21, cert. denied, 372 U. S. 954, that a union may be sued under § 1391 (b) in any district where it is doing business. The Second Circuit in *Rutland* recognized that prior to the Judicial Code of 1948, under the predecessor of § 1391 (b),[2] most courts had held that an unincorporated association is suable only at its principal place of business and that the only express change made in pre-existing general venue law by the 1948 Code was the expansion of corporate venue from the place of incorporation to the place of doing business, § 1391 (c).[3] Nevertheless, the court reasoned that there are sound policies for treating unincorporated association like corporations and that, though the language of § 1391 (c) expressly applies to corporations and not to unincorporated associations, Congress implicitly intended for the expanded concepts of corporate residence under § 1391 (c) to be applied in determining the residence of an unincorported association under § 1391 (b).

For myself I cannot draw any such inference from the 1948 amendments to the general venue statute. Sections 1391 (b) and (c) were part of a general Code revision designed comprehensively to cover the rules of procedure, including venue, and there is no reference whatever in these sections or their legislative history, so far as I can determine, that would permit us to infer that Congress intended for unincorporated associations to be treated as corporations for venue purposes, thus changing the judicially established rule that unincorporated associations

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[2] 36 Stat. 1101, 28 U. S. C. § 112 (1940), provided that "no civil suit shall be brought in any district court against any person . . . in any other district than that whereof he is an inhabitant . . . ."

[3] 28 U. S. C. § 1391 (c):

"A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

are suable only at their principal place of business. Though this Court recognizes that "Congress has maintained its silence . . . with respect to the residence of the unincorporated association," it approves the *Rutland* holding because "sound policy considerations" indicate it "most nearly approximates the intent of Congress." In reaching this result, the Court adopts the *Rutland* reasoning that Congress in 1948 must have approved of assimilating for venue purposes the treatment of unincorporated associations to that of corporations, because such a process of assimilation had been advocated by Judge Learned Hand in *Sperry Prods., Inc.* v. *Association of American R. R.*, 132 F. 2d 408, cert. denied, 319 U. S. 744. The narrow issue dealt with in *Sperry* was where, under the special venue provisions for a patent infringement suit,[4] is an unincorporated association deemed to be an "inhabitant." The *Sperry* court first held that, since an unincorporated association can be sued in its own name to enforce a federal right, *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344, and since it can be served with process under Fed. Rule Civ. Proc. 17 (b), it should, for venue purposes, be treated as a single individual, not an aggregate of individuals.[5] The *Sperry* court then held that for purposes of the special patent venue provision an unincorporated association is an "inhabitant" of the district where its principal place of business is located—precisely what the Court of

[4] 36 Stat. 1100, 28 U. S. C. § 109 (1940), provided that suits for patent infringement must be brought "in the district of which the defendant is an inhabitant, or in any district in which the defendand . . . shall have committed acts of infringement and have a regular and established place of business."

[5] None of the parties here have suggested that an unincorporated association's residence for venue purposes depends on the residence of each individual member, and I agree with the Court's holding that an unincorporated association like a union is a single entity with a residence. The only problem here is to locate that residence.

Appeals held here as to § 1391 (b). In reaching this result, Judge Hand advanced legislative policy reasons, similar to those advanced by the Court here today, for treating an unincorporated association like a corporation, then deemed to be an inhabitant only of its State of incorporation and of the district within that State where its principal place of business was located. It is Judge Hand's process of reasoning, not his holding, that the Court uses in assimilating the treatment of unincorporated associations under § 1391 (b) to the treatment of corporations under § 1391 (c).

I find many objections to doing what the Court does here. First, even assuming that in enacting § 1391 Congress was aware of the *Sperry* decision and thought it applicable to general, as distinguished from patent, venue rules[6] (an assumption I think completely unfounded), it is doubtful that Congress, without saying so, intended to reject the holding of that case—that an unincorporated association is suable at its principal place of business—but at the same time adopt its reasoning—dicta to the effect that an unincorporated association should be treated like a corporation. Second, the only indication I can find of what Congress intended in 1948 as to unincorporated associations comes from Professor Moore, who participated in drafting the Code and who in 1949 wrote:

> "*Sperry Products, Inc.* v. *Association of American Railroads* took the position that an unincorporated association is an 'inhabitant,' i. e., resident, of the

[6] After *Sperry* the lower courts divided on whether its holding should be extended to the pre-1948 general venue provision (see n. 3, *supra*). Compare *Brotherhood of Locomotive Firemen* v. *Graham*, 84 U. S. App. D. C. 67, 175 F. 2d 802, rev'd on other grounds, 338 U. S. 232, and *Griffin* v. *Illinois Cent. R. Co.*, 88 F. Supp. 552, 555, with *Thermoid Co.* v. *United Rubber Workers*, 70 F. Supp. 228, 233–234.

> district where it has its principal place of business. And this doctrine has been applied to a partnership . . . . The Code has changed none of these doctrines."[7]

Third, Congress in 1948 was clearly aware of the venue problems involved in suing an unincorporated association. Just the year before, in 1947, it had expressly considered these problems in relation to suits against labor unions to enforce collective bargaining agreements[8] and in § 301 (c) of the Labor-Management Relations Act, 29 U. S. C. § 185 (c), explicitly provided for venue in such suits "(1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members." That action is wholly consistent with the idea that Congress' total failure in 1948 to provide a similar venue rule applicable to other kinds of suits against a union was neither inadvertent nor meant to be cured by judicial implication. Whether there is "little" or much "merit" in holding that venue of a union subject to the Railway Labor Act is different from the venue of a union under the express venue provisions of the National Labor Rela-

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[7] Moore, Commentary on the U. S. Judicial Code 193 (1949). Now, however, for legislative policy reasons such as the protection from abuse contained in the transfer provision of 28 U. S. C. § 1404 (a) and the multi-state nature of unincorporated associations' activities, Professor Moore believes the position taken in *Rutland* "desirable." 1 Moore, Federal Practice ¶ 0.142 [5.–4], at 1508. See also Comment, 44 Calif. L. Rev. 130 (1956); Note, 39 St. John's L. Rev. 353, 358–360 (1965); Note, 13 Okla. L. Rev. 206 (1960); 45 Geo. L. Rev. 132 (1956). But see Kaplan, Suits Against Uuincorporated Associations Under the Federal Rules of Civil Procedure, 53 Mich. L. Rev. 945, 949–950 (1955); 8 Stan. L. Rev. 708 (1956).

[8] H. R. Rep. No. 245, 80th Cong., 1st Sess., 108–109 (1947); S. Rep. No. 105, 80th Cong., 1st Sess., 15–18 (1947).

tions Act is a question for Congress, not this Court. Finally, since 1948 the lower courts have been completely divided on the question of whether an unincorporated association can be sued at a place other than its principal place of business.[9] In the light of all these things, I cannot impute to Congress an unarticulated intent to make an unincorporated association's venue precisely the same as that of a corporation.

Neither the language and history of the general venue statute nor any prior decision of this Court throw any light on the question presented here. In the final analysis it is simply an important question of public policy. Reasons can logically be advanced for expanding the venue of unincorporated associations to include districts where they engage in business, but just as strong reasons can be advanced for not doing so. Though venue, relating to the convenience of the litigants, is quite different from jurisdiction, relating to the power of a court to adjudicate, *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 167–168, and though Congress may have more constitutional leeway to deal with venue than with jurisdiction, *Steelworkers* v. *Bouligny*, 382 U. S. 145, venue

[9] Cases holding an unincorporated association may be sued only at its principal place of business: *Brotherhood of Locomotive Firemen* v. *Graham*, *supra*, 175 F. 2d, at 804, n. 2; *McNutt* v. *United Gas, Coke & Chem. Workers*, 108 F. Supp. 871, 875; *Salvant* v. *Louisville & N. R. Co.*, 83 F. Supp. 391, 396; *Westinghouse Elec. Corp.* v. *United Elec. Radio & Mach. Workers*, 92 F. Supp. 841, 842, aff'd without discussion, 194 F. 2d 770; *Cherico* v. *Brotherhood of R. R. Trainmen*, 167 F. Supp. 635, 637–638; cf. *Hadden* v. *Small*, 145 F. Supp. 387 (partnership). Cases holding that unincorporated associations may be sued where it does business: *Portsmouth Baseball Corp.* v. *Frick*, 132 F. Supp. 922; *Eastern Motor Express* v. *Espendshade*, 138 F. Supp. 426, 432; *American Airlines, Inc.* v. *Air Line Pilots Ass'n*, 169 F. Supp. 777, 781–783; *R & E Dental Supply Co.* v. *Ritter Co.*, 185 F. Supp. 812; cf. *Joscar Co.* v. *Consolidated Sun Ray, Inc.*, 212 F. Supp. 634.

rules nevertheless pose policy considerations which are and should be weighed by Congress and not by this Court. As we said in *Olberding* v. *Illinois Central R. Co.*, 346 U. S. 338, 340: "The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction." I think the Court oversteps its boundaries in doing that which Congress did not choose to do in expanding the venue provisions with reference to corporations. I would leave the law of venue as it is until Congress decides its own policy.[10]

I would affirm the judgment of the Court of Appeals.

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[10] Since I agree with the Court that the 1966 amendment of § 1391 (b) should apply to pending cases such as this one, I would not have filed this dissent had the Court remanded this case solely for a determination of the propriety of venue under the 1966 amendment.